

CHICAGO BAP 73095 4ssociation



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CHICAGO BAP 73095 48SOCIATION

October Term, 1912. No.

201 - 18659.

MARIE CASPER, a minor, by MATERY CASPER, her next friend, Defendant in Error

ANDREW GROK and EWIL GROK,
Plaintiffs in Error.

186 I.A. 9

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

12/85

MR. JUSTICE DURGAN DELLVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse an order and judgment of the Circuit Court of May 18, 1918, refusing to enter a nume pro tune order for the assendesh of the bill of exceptions theretofore eighed by the trial judge.

An appeal to this court was pending at the time plaintiff in error filed said motion and the case appealed,
No. 18361, Marie Casper, a sinor, by Mathew Casper, as next
friend, v. Andrew Geck and Emil Gsck, has heretofore been disposed of, the opinion therein being filed February 4, 1914.
A motion to consolidate this case with the case appealed has been heretofore denied.

The amendment cought to be made by plaintiffs in error was the certifying by the trial judge of eix affidavite made on their behalf in support of their motion for a new trial in the court below as a part of the bill of exceptions forming a part of the record in the appeal case, No. 18361. The affidavits set forth certain alleged misconduct of the jurors who tried the case in the court below and rendered the \$4,000 verdict in favor of defendant in error for personal injuries.

On the hearing of the motion in question the only evidence offered in support thereof, so far as this record shows, was the six affidavits aforesaid found in the files of said cause in the lower court, and the endorsements thereon

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design as the senit in wheth the interest product of the set of the senior of the seni

The tile of the presence of the patient of the restrict the constitution of the contract of th

of the clerk of the court showing that they were all filed Recember 23, 1911.

The record in this case does not contain the motion to smend the bill of exceptions, and does not show the date of the judgment in the trial court, or when the criginal bill of exceptions was filed, or in what time it was required by the court to be filed. It does regite that due notice of esid motion was given to defendant in error's attorneys, and that said attorneys were present at the hearing of said motion. Defendant in error states in her brief and argument that the original judgment was entered in the original suit December 33, 1911; that the time for filing of the bill of exceptions sought to be assended expired sixty days thereafter, February 21, 1913; and that it was filed February 13, 1912. Her said statement is unquestioned. There is no proof in this record that the original bill of exceptions did not contain the said affidevits as parts thereof, but we may assume that it did not contain said affidavita as parts of it as it is unquestioned by defendant in error.

A bill of exceptions when signed and sealed by the judge, and properly filed in the case, becomes part of the record of the case to which it relates. At any time during the term of court in which the judgment was rendered, it may be smended by the presiding judge who signed it without notice. After the term has expired it can only be smended upon due notice, and by order of the court upon proper evidence submitted. Heinsen v. Lamb, 117 Ill., 549.

Then such an order of the court asending any record in resisted, as it was in this case, it can not be legally made upon parole evidence, but only upon sufficient evidence appearing by some memorandum, minute or note of the judge, or something appearing on the records or files of the court,

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in regional, we it was in this case, if our not he lessing and come of the initial explosion of the pulse, where or note of the julie, or recruiting appreciate or note of the julie, or recruiting appreciate or not or illes of the court,

to show the facts in respect of which the amendment is sought to be made. No record can be made or determines from the memory of witnesses or the personal recollection of the juste himself. C., N. & St. P. Rv. Cc. v. Taleh, 150 Ill., 807; Stein v. Meyers, 253 Ill., 199.

Where a party seeks to question in this court the correctness of an order of a court in allowing or denying a motion to exend a bill of exceptions, it is incumbent upon him to show by a bill of exceptions the evidence upon which the court seted. In the absence of such a showing the usual presumption will prevail that the court's order and jumpent was surjorted by the evidence. Gebbis v. Sceney, I'll III., 135; C. F. & M. P. By. Co. v. Sleh, surge: Stein v. Leyers, pures.

There is no proper evidence in this record that the affidavits accept to be made a part of the bill of expections in question were ever read to the court or presented to him for consideration on the action for a new trial or otherwise. It is not sufficient to show that they were filed in the case. The regital in the record "that it appeared to the court from an examination of his significant of the motion for a new trial to the court during the argument of the motion for a new trial is insufficient, so it is not a recital of the evidentiary facts, but serely a conclusion therefrom. The minutes enough have been introduced in evidence, and incorporated in this record.

The judgment of the court is affirmed.

AFTIMED.



October Term, 1912. No. 360 - 18723.

PORTICE NUMBER COMPANY, Defendant in Error, 186 I.A. 11

VS.

FRUIR DROP FORCE COMPANY,
Plaintiff in Ergor.

OF CHICAGO.

un. Justice hundan officers of the object of the court.

This action was brought June 11, 1913, against Fruin Drop Forge Company, plaintiff in error, to recover the price of 3,792 hoof pade manufactured for it by defendant in error. The case was tried without a jury, and judgment was entered in favor of Portage Subber Company, defendant in error, for \$388.06 and coats.

Plaintiff in error asks a reversal of the juigment upon three grounds, (1) that there was no sentract between the parties for the manufacture of the goods in question; (2) that there was no delivery of the goods sued for; (3) that there was no agreement as to the price of the goods, and no proof in the regard as to their value.

The evidence discloses that plaintiff in error had provious to November 20, 1911, placed its boulds in the hands of defendant in error from which to manufacture pads on orders of plaintiff in error. On November 20, 1911, plaintiff in error ordered a bill of made from defendant in error, using those words and figures:

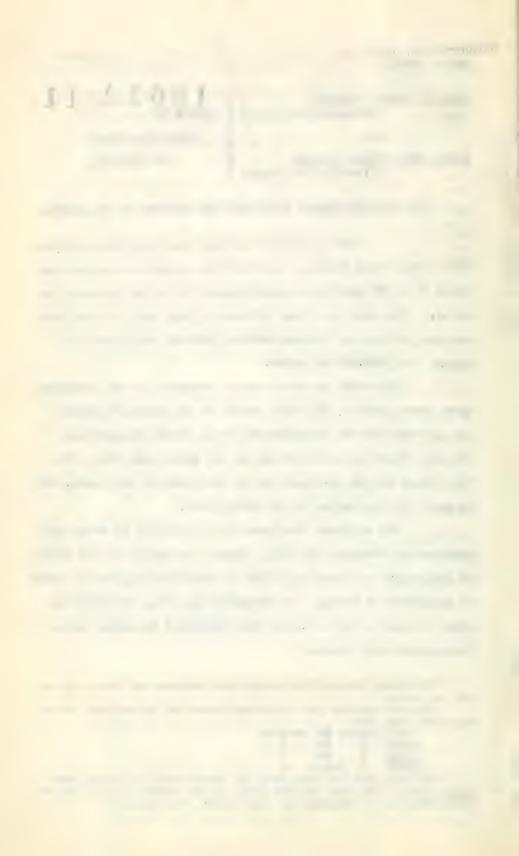
"Enclosed please find check for balance due Sept. 8/c as

"Kindly prepare the following order to be shipped us on or after Dec. lat.

4500 pieces #4 Rubbers

3000 # #3 # 3500 # #6 # 10000 # Totsl #

[&]quot;If you will you may heep in stock over and above each order sent about 2000 pieces each of the above three wises as they seem to be standing up very good: No. 3-4-6."



Defendant in error realied to said letter as follows:

*We acknowledge with thanks your order of 30th for - 4800 risess #4, 3000 risess #3, 2500 risess #0 - runters from your moulds at 38g per pound and to be shipped on or after December lat.

"We also note that you would like for us to keep in stock over and above such order sent about 5000 pieces such of above sizes. We will be glad to do this, but we would like for you to send us your regular order for same and aark

the order 'to be shipped when instructed to do so'.

"You do not say how you want the fabric on these subbers, but we are proceeding with the order taking it for granted that you want two plies of Buck clear across the heel like the new outting dies you recently eant us. In the event that this is not correct, kindly advise us by wire upon receipt of this letter."

Refendant in error manufactured the 10,000 ricoss of rubber. Nos. 3. 4 and 6. as above ordered, and shicked them to plaintiff in error who afterwards paid for them at 321¢ per pound. Defendant in error also began the manufacture of the 2,000 pieces each of Nos. 3. 4 and 8 pads. and completed 1.383 of No. 3, 1,797 of No. 4 and 1,295 of No. 5 pads, when it received a letter of December 20. 1911. From plaintiff in error stating that it contemplated making some changes and requesting defendant in error to await further instructions concerning the 8,000 order. Defendant in error ceased manufacturing those 6,000 at once and wrote to plaintiff in error that it had practically all of them made up, and that their idea of requesting a regular order for them was to make their records clear. Plaintiff in error again replied that defendant in error did not accept their order of Wov. 20, 1911, for the 6,000 pads, 2,000 of each Rusber 3, 4 and 6, and that owing to a change it had made it could not use them.

We think that defendent in error's letter of Nov.

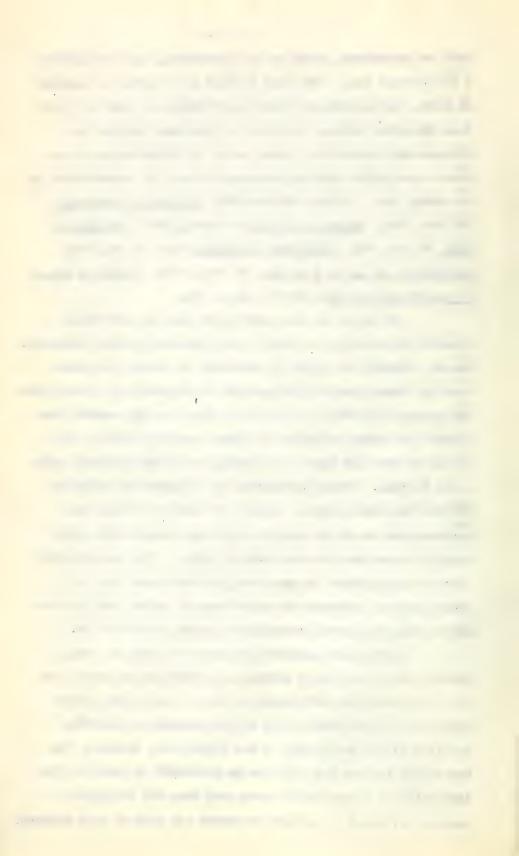
33, 1911, constituted as unconditional acceptance of plaintiff
is error's request to assufacture and keep in stock for it
the 6,000 rubber pade. The words, "We will be glad to do so",
taken alone should undoubtedly be construed as an acceptance,
and the request for a regular order for the goods to be shipped



when so instructed, added to the acceptance, sid not make it a conditional one. The rule is that if an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because followed by inquirtee whether the offerer will change his terms, or as to future acts, or because accompanied with expressions of hope, or suggestions, or requests, etc. S Cyc. 269 and 200; Culton v. Gilonvist, 30 Icva, 718; Brown v. Bairue, 63 Hans., DRJ; Phillips v. Moor, 71 No., 78; Rievensch v. Molean, 35 P. D. R., 348; Livrence v. R. L. S. & T. Cc., 84 Sis., 477; Facris N. Co. v. Payenport G. & B. Co., 68 Ill. App., 104.

accepted by letter, the doubt is all removed by other evidence. One Mr. Wildman, an agent of defendent in error, testified that Mr. Fruin, secretary-treasurer of plaintiff in error, teld him January 23, 1912, that he would take for his company the rubber pade which defendant in error then had on hand, but wanted to take his time in so doing, as he was indebted quite a lot to them. This proposition was accepted by defendant in error by letter with a request to know if it would be satisfactory for it to make the shipment ismediately, provided it dated the inscise Narch 1, 1912. The raply to that letter by plaintiff is error was, in substance, that it would instruct defendant is error when it wanted the pade and not to ship them until defendant in error heard from it.

Afterwards plaintiff in error on April 6, 1913, ordered 500 of the No. 3 rubbers and defendant in error sent it a box containing 583 pieces of No. 3, and in its letter stated that those were a part of the rubbers in question, and also stated the number of the 8,000 still on hand. The box of 583 rubbers was paid for by plaintiff in error at the maps price as former orders were paid for, 32% cents per pound, but later it refused to accept any more of said rubbers,



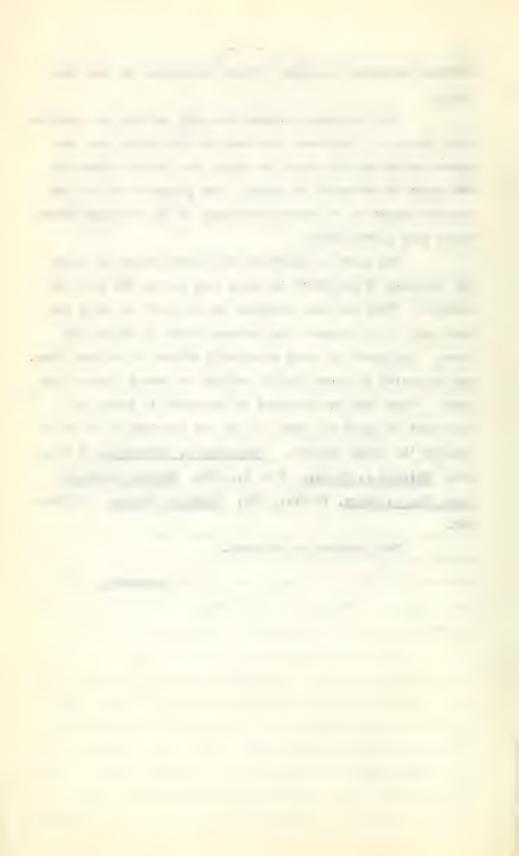
although defendant in error effered recestedly to ship them to it.

The foregoing evidence not only settled the question that there was a contract, but made it also clear that the agreed price was 38% cents per pound, the price allowed by the court to defendant in error. The judgment was for the correct amount at 38% cents per pound, as the evidence showed there were 1,194 pounds.

for delivery to plaintiff in error long before the suit was brought. They had been accepted by plaintiff in error and eare hold at its request for delivery until it called for them. Defendant in error repeatedly offered to deliver them, and plaintiff in error finally refused to accept them at any time. They were the property of plaintiff in error and defendant in error had done all the law required it to do to receive the price thereof. Pohneider v. Testerian, so Ill., 474; Gricers v. Barvey, 2 R. I., SRI; Central Leith. & Figs. Co. v. Boore, 75 Fig., 170; Porey v. Sciles. Th Ind., 488.

The judgment is affirmed.

AFFIFHED.



FALLS CITY TANNERY, a corporation,

Appellee,

VS.

W. D. ALLEN MANUFACTURING COM-PANY, a corporation,

Appellant.

186 I.A. 13 APPEAL PROM

EUNICIPAL COURT

OF CHICATO.

186 I.A. 13

SINTERNE OF THE CASE. On and prior to September 2, 199, the plaintiff, Falls dity Tarnery, a Kentucky corporation, was engaged in the business of tarming hides at Louisville, Fentucky. and the defendant, an Illinois corporation, was engaged in the manufacture and sale of leather belting, at Chicago, Illinois, on said date, at Louisville, the defendant, by J. J. McCauley. its a rat, executed and delivered to the plaintiff the fullowing instrument:

"We agree to take all the #1 Butts on hand at Louisville 6474, the two piles examined of lighter weights 6454, and the eleven hundred more or less, at Philadelphia, Ps., in the hards of irkputrick & Co., if unseld, at 45d. Terms on these eleven hundred to be, 5% - 10 days, Oct. 5th. Others 5% 10 days upon receipt of Butts. All f.o.b. Louisville and Philadelphia".

he number of belt butte of each grade, the total weight thereof as given by plaintiff and the total price to be paid by defendant were as follows:

> "SBR No. 1 Belt Butts (total weight 10796 lbs.) at 47¢ per lb. 191 No. 2 Belt Butts (total weight 4745 lbs.) at 45¢ per lb.

25,074.18

\$2,135.25

1103 No. 2 Belt Butts (total weight 27505 lbs.) at 45c per lb. Total -

12,377.25 19.586.52"

All of said belt butts in Louisville were delivered by plaintiff to defendant on September 3, 1900, f.o.b. Louisville, ard all in Philadelphia were likewise delivered on deptember 4, 1909, f.o.b. Philadelphia. Prior to the execution of said instrument the belt butts in Louisville were inspected by said

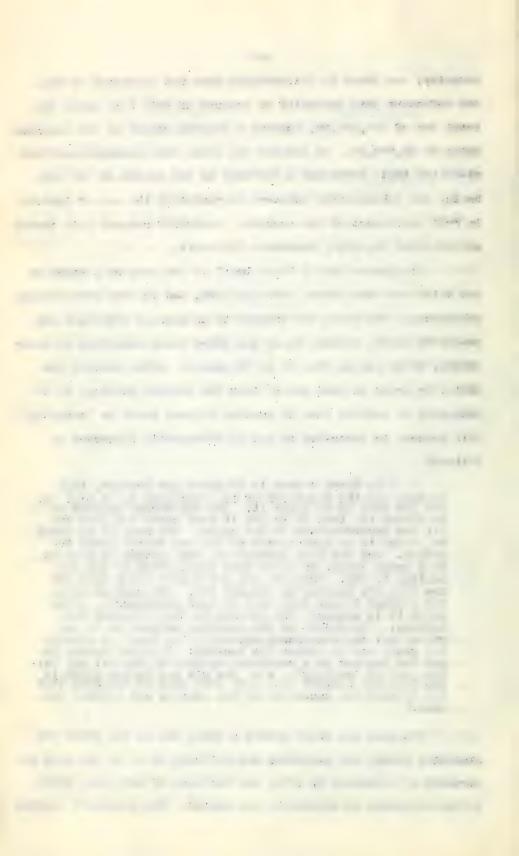


The defendant paid plaintiff on account of said belt butts the total sum of \$17,209.37, leaving a balance unpaid on the contract price of \$2,377.25. On October 20, 1909, the defendant notified plaintiff that there was a shortage in the weight of the belt butts, and subsequently tendered to plaintiff the sum of \$2.8.04 in full settlement of the account. Plaintiff refused this tender and on April 25, 1910, commenced this suit.

It appears that a "belt butt" is the hide of a steer or cos which has been tarmed with oak bark, and is free from foreign substances. The butts are trimmed to an average width and are graded as light, medium, heavy and extra heavy according to their weight, which ranges from 2° to 40 pounds. After tanning the butts, in order to make use of them for leather belting, it is necessary to subject them to another process known as "currying". This process is described by one of defendant's witnesses as follows:

The first course is to shave the leather, that is take all the flesh off of it. The next is to mill it. And the next is to scour it. And the fourth process is to bleach it, that is to get it even color and take out all the imperfections in the color. The next is to stuff it, which is an application of oil and tallow mixed together. And the next process is, the leather is hung up in a green state, or after this application of oil and tallow which does not dry into the leather is scraped off. The next process, the leather is put into what we call stretchers. After which it is glazed. The leather is then finished for belting. The object of the scouring process is to get rid of all the extraneous matter in the hide, to clarify the grain and to soften the leather: in other words, to put the leather in a condition to take in the oil and tallow, called 'dubbing'. 2 s The oil and tallow which is put into the leather will more than make up the loss that the leather has sustained in the shaving and milling process."

The case was tried before a jury, and on the trial the plaintiff proved the execution and delivery to it of the said instrument of Deptember 2, 1989, the delivery of said belt butts to the defendant as aforesaid, and rested. The plaintiff claimed



that defendant owed it the said balance of 12,377.25 for said belt butts, together with interest thereon, to-wit: \$518.75. amounting in all to the sum of 12004. The defendant claimed that it was indebted to the plaintiff in the sum of only 1208.04. whic sum it had previously tendered to plaintiff, and set up in its amended affidavit of merita and urged upon the trial, as a defense to the balance of plaintiff's claim, that plaintiff had, with intent to cheat and defraud defendant, knowingly and wilfully loaded, charged or treated the said belt butts or bides with large quantities of glucose, for the purpose of wrong ully increasing the weight of said hides, and had thereby deceived and defrauded defendant to the extent of the amount and weight of such foreign substance so applied and absorbed by the hides. At the conclusion of the defendant's case the trial court instructed the jury to return a vertical in favor of the plaintiff for 2.394. which they did, and judgment was entered upon the verdist against the defendant.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE GOURT.

The principal point urged by counsel for the defendant

for a reversal of the judgment is that the trial court erred
in airecting the jury, at the close of the defendant's evidence,
to return a verdict for the plaintiff.

The testimony introduced on behalf of the defendant tended to show that at the time defendant's agent, Nosauley, inspected those of the belt butts which were in Louisville for the purpose of ascertaining their grade, quality, tria, etc., plaintiff knew that defendant, if it purchased them, intended to manufacture them into leather belting; that at that time it was impossible for McCauley, from such inspection, to determine whether the butts contained any foreign substance such as glucose or other seight increaser; that at that time the president of

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plaintiff represented to "coauley that said butts had not been "looked" or "doped", and that the butts in Philadelphia were of lile quality and in like condition: that, as a matter of fact. slucese bat previously been applied to the butts to the knowledge of the president of plaintiff; that McCauley, after purchasing the butts for defendant, instructed plaintiff to ship the same to Hars Rees a Lons, Asheville, North Carolina, for the purpose of there having thee "curried": that after their arrival at Asheville and before they were "curried" the leather was weighed: that usually leather after being put through the currying process will weigh as much as it does when in the rough, if not more: that this is so for the reason that the loss of seight in the leather, occasioned by the shaving, milling and scouring processes, is usually more than made up from the amount of oil and tallow put into the leather; that after this particular leather was "curried" it was found that there was a shrinkage in the weight thereof of 4,500 pounds; that glucose cozed out of the leather in large quantities when the leather was put under the accuring machine; and that the use of glucose in large quantities is not recognized as proper in the tanning of leather, but is sometimes used by some tarmeries for the purpose of increasing the weight of the leather.

"A person who has been fraudulently induced to enter into a contract has the choice of several remedies. He may repullate the contract and, temiering back what he has received under it, may recover what he has parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action of deceit the damages caused by the fraud." (20 Syc. 87; Peck v. 1 rewer, 48 lil. 54; Allin v. Millison, 75 lil. 201; pringer v. 11tz, 133 ill. App. 555.) "Torover, if sued upon the contract

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he may set up the fraud as a defense, or as a basis of a claim for damages by ear of recoupment or counterclaim." (20 tys. 07; Peck b. Brewer, supra: White v. Sutherland, 34 Lll. 181, 191.)

"the rule of caveat emptor only requires the exercise of such care and attention as is exercised by ordinarily prujent men in like business affairs, and only applies to defects which are open and patent to the senses. And the doctrine does not apply in cases of positive fraud or misrepresentation by the vendor as to a material fact, where the purchaser, acting with remenable prudence, had a right to rely and did rely upon the representation." (30 dyc. 1878.) "Fraul may consist in making a false representation with the knowledge at the time that it is false, with a design to deceive and defraud, or in the wilful concealment of the truth for a similar purpose." ("coonnell v. Wilcox. 1 Soam. 344, 365; Lockridge v. Foster, 4 Scam. 569; Aertson v. Ridgway, 18 Ill. 23, 28; Stewart v. Wyoming Cattle Co., 108 U. D. 365, 388.) "If the defect is latent and known to the seller his intentional omission to dislose it constitutes actionable fraud. a a And where the defect is latent the purchaser may recover notwithstanding that he examined the article and failed to discover the defect". (20 Gyc. 63.)

In Frazer v. Howe, 108 Ill. 565, 573, it is said:

"Wotions to exclude evidence and motions to instruct the jury

to find for the defendant * * are in the nature of decurrers

all

to evidence, and hence they admit not only, that the testimony

proves, but all that it tends to prove. * * It is not within

the province of the judge, on such a metion, to seigh the evid
ence and ascertain where the preponderance is. This function

is limited, to determining whether there is, or is not, evidence

legally tending to prove the fact affirmed. In Libby, "eweill

Libby v. Jock, 282 Ill. 206, 212, it is said: "If there is no

the state of the s the second of Sales St. Col. the grade of the control of the cont The same is precised the same of the party of the same is an The second secon the state of the s La charle of A ... , compared to the second second The second secon of the same of the the second secon The second secon

evidence, or but a scintilla of evidence, tending to prove the material averagents of the declar tion, the jury should be directed to return a vertict for the defendant. If, however, there is in the record any evidence from which, if it stood alone. the jury could, 'without acting unreasonably in the eye of the last, find that all the material averments of the declaration had been proven, then the cause should be submitted to the tury." The same rules are applicable where the defendant introduced evidonce tending to support an affirmative defense to the plaintiff's sauce of action, and the plaintiff, at the close of the defendant's evidence, moves for a directed verilet in his faver. (Anthony v. Theeler, 100 Ill. 138, 155; Wolf v. Chicago Sign Printing Co., 233 Ill. 501, 504; Woodman v. Illinois frust & Savings Bank, 211 111. 576, 581.) In Frazer v. Howe, supre, it is said: "If there is no evidence before the jury, on a material issue, in favor of the party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor. the court may exclude the evidence, or direct the hury to find against the party so holding the affirmative; but show there is such evidence before the Jury, it must be left to them to determine its weight and effect."

Considering the evidence introduced in this case by the defendant, in support of its affirmative defense as disclosed from its amended affidavit of merits, together with all legitimate inferences which may be grawn from such evidence in its favor, and also considering the rules of law above mentioned, we are of the opinion that the trial court in this case errod in instructing the jury at the close of defendant's case to return a vertical in favor of the plaintiff for said sum of \$2,894.

Accordingly, the judgment of the Humicipal Court will be reversed and the cause remanded.

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ARNA C. HALLSTROE. Appellant,

VS.

JAMES T. MCCULLOUGH and GUSAN S. McCULLOUGH, Appellees. AFFAL FROM SETTINGS COURT
OF COOK COUNTY.

136 I.A. 14

MR. PASSIDING JUSTICE BAKER DELIVERED THE OFFICE OF THE COURT.

perior Court and obtained a temporary injunction which that Court afterwards dissolved. From the order dissolving the injunction this appeal is prosecuted by the complainant is the bill. The order was clearly an interlocutory order. Complainant by her bill sought other relief than an injunction no the order dissolving the injunction cannot be held in legal effect a final decree dismissing the bill.

for appeals from interlocutory orders, less of 1907, p. 469.

Dection 183, does not authorize an appeal from an order sissolving an injunction, and as the right of appeal is purely statutory it follows that no appeal lies from such an order.

The appeal is dismissed and the Court allows to the attorney for ampellees a solicitor's fee of twenty dollars, to be taxed as part of the costs of the appeal.

AFTEAL DISKISSED.



March Term, 1913, No.

304 - 19312

MAX MEYERS.

Appellant,

Appeal from
County Court,
Cook County.

JOEL JOHNSON.

VR.

Appelles.

186 I.A. 37

MR. PRESIDING JUSTICE SMITH DELIVERED THE COUNTRY OF THE COURT.

Appellant, Max Meyers, sued appellee, Joel Johnson, in sesumpsit for rent of certain presides at the rate of \$42 per month, for the months of July, August, September, October, November and December of the year 1911, and January and February, 1813, and for \$10 for each of the months of March and April, 1912. The declaration consisted of a special count and the common counts.

On the trial, the court below entered judgment against plaintiff, appellant, for costs in favor of appellas. This appeal is to reverse that judgment.

It appears from the record that one Henry Hogens, then the owner of some flate and store buildings on Herrison street, between Lombard and Harvey avenues in Oak Park, Illinois, entered into a written lease with the appellee, Joel Johnson, for one of the flate and stores for the period from September 1, 1905, to April 30, 1911, for the sum of \$900, payable \$45 a month in advance on the first day of each month during said term. On August 31, 1910, the property in question was surchased by the claimtiff, Mayers, and with the lease was conveyed and assigned by Mogans to Mayers.

After eigning the lease, Johnson moved into the premises and paid his rent regularly at first to Foguns and then, after August, 1910, to 7. F. Cotton, a real settle agent who took obergs of the building for agrellant. Sometime in March, 1911,

A CONTRACTOR OF THE CONTRACTOR

 nore than a month before the lease expired, Cotton asked Johnson if he was going to stay over after his lease ran out. To this Johnson responded that he intended to move out as soon as a building, which he was constructing, sas completed. Cotton then told Johnson that if he did not move out on April 30, 1911, the landierd would hold him for another term. Appelles Johnson held over and continued to remain in possession of the demised premises after the expiration of the written lease until July 4, 1911. On May 25, 1911, Cotton served the following notice on Johnson:

" J. P. Johnson, Esq., Oak Park, Illinois.

Dear Sir:

You will take notice that insemuch as your lease to the premises held by you under me in the building owned by me, at the northwest corner of Lombard Ave. and Harrison Etrest, expired by ite terms on Agril 30, 1911, and you are now holding over, that I have elected to consider you a tenant from year to year of said granises under the same terms and conditions (except as to the period of the term thereof) of the said lease expiring April 30, 1911.

Yours very truly,

(Signed) Wax Meyere.

Chicago, May 25, 1911."

Appelles Johnson paid no rent after June 30, 1811.

The premises remained vacant from July, 1811, until March 15, 1812,—
eight and a helf months. In the meantime, cotton, the agent, attempted by advertising in the newspapers and clacing "For Fant"
cards in the windows to find a tenant, but was unable to do so
until Warch 15, 1913, when the premises were rented to another
temant at \$35 per month,—\$10 per month less than the rent reservad in the Johnson lesse.

Johnson commenced the erection of a \$10,000 building for his own use and occurancy across the street from the desised ators and flat. This building was not completed until the latter part of June, 1911, then Johnson moved cut of the premises in question and into his own newly prected building.

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The only defense shown in the record to the action is that appelles vacated the premises, after holding over, to above stated, because there were no bars on the back sindows of the store. The only foundation for this defense rests in a written agreement signed under seel by Harry Hogans, the son of Henry Hogans, at the time that Johnson signed the lease in question. That agreement was as follows:

"This agreement made this twenty-fourth day of July, f. I. 100, between Henry Mogane, party of the first part, and Joel Johnson, of the second part,

Witnesseth: That the said party of the first part agrees to build a barn on precises,

And to put iron bars on the two rear windows of store,

And not to let any other stores in block to be used for grocery or market.

And, in case party of the first part fails to com-

And, in case party of the first part fails to comgry with terms of this agreement, the leass will be null and world.

Henry Hogans, Agt. (Seal)

L. H. Gerberdt (Agent)

Joel Johnson,"

It appears that when Johnson asked for bars on the windows, Harry Hogans, who had brought the lasse to Johnson to be executed, told Johnson that the matter of bars on the windows had not theretofore been mentioned, and that he, Herry Hogans, was not sure Johnson could have them, but Gerhardt, the agent, spoke up and told Harry Hogans that he could sign the paper and that his father would say it was all right. Harry Hogans thereupon signed the agreement.

There is no evidence that Harry Hogans had any authority from his father to execute any agreement in regard to the wars. The boy, who was only eighteen years of age at the time, disclaimed any authority from his father regarding the bars. He brought the lease, already down, to the office of the agent for execution by Johnson. Henry Hogans afterwards eighed the lease.

The bars were not put on the rear windows of the store and no mantion was made of them by agreeless to Hogans, or to Max Mayers, during

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ing the term of the lease. Henry Hogans testified that the first he ever heard of these bars was after the suit in question was started. The plaintiff, Meyers, saw Johnson but once during the term of the lease, and no mention was then made about the bars or their absence.

In our opinion, the payment of rent by appelles continuously for twenty months, with the knowledge of the absence of the bars on the windows, waived the conformance of that covenant, even if it was executed by a duly authorized egent. Hencen v.

Hanson Hardware Co., 135 N. V. Rep. 766; Monson v. Bragdon, 159

Ill. al. But, there is no proof of any authority in Harry Hogans, the son, to execute the payer relied on in schalf of his father,, nor was there any ratification of the agree ent by Henry hogans or b, appellant. The voluntary payment of rent by appelles so long as he remained in possession, without complaint or protest, estops him from setting up a right to declare him lesse null and void after abandoning the premises. Orautt v. Isham, 70 Ill.App. 102; Noble v. Chrisman, 88 Ill. 186.

By holding over under the lease, appellee gave the leaderd the undoubted right to elect to treat such helding over as a tenuncy for another year under the terms of the original lease. Coldstrough v. Cable, 152 Ill. 584; *sbater v. Nichole, 102 Ill. 160; Clinton Wire Clock Co. v. Gerdner, 59 Ill. 151; McKinney v. Pack, 28 Ill. 174.

The evidence in the case shows a right of recovery, and fails to show any legal defense to the action.

The court below erred in refusing to give instructions

Nos. 7, % and 9, requested by the plaintiff. These instructions

were as follows:

of law that a person dealing with one known to be an agent, or claiming to be such, is bound at his peril to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent

. . . . (Answir ()) , Haland to the control of the public and the control of the contr The state of the s the second probability of the second participation and second

authority."

"S. The court instructs the jury as a matter of law that sefore Henry Hogans can be bound by the acts of his son, Harry Hogans, it must be shown by the difendant, by competent evidence, that Henry Hogans authorized Harry Hogans to set for him and in his behalf in executing the arsciel agreement relied upon by the defendant."

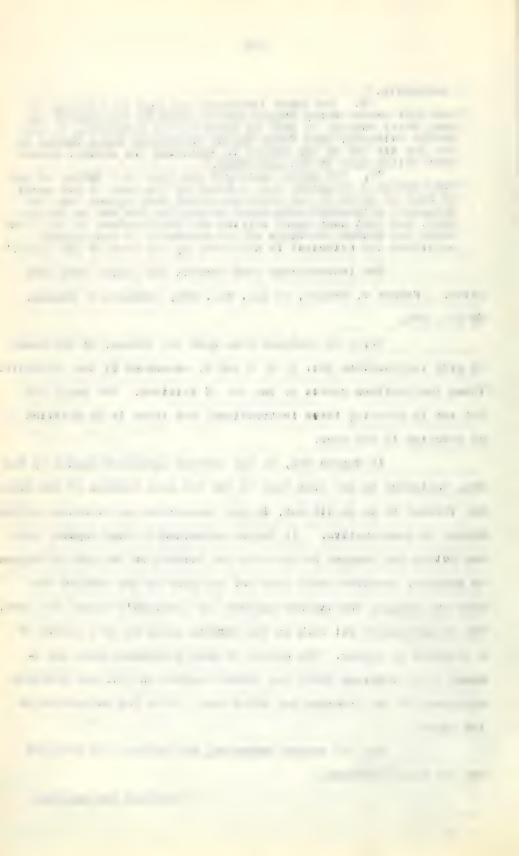
"9. The court instructs the jury as a matter of law that before a principal can to bound by the acts of his agent, it must be shown by the party asserting such agency that the principal authorized such agent to act for him and in his behalf, and that such agent cerried out the business of his principal and within the scope of his authority as such agent; otherwise the principal is not bound by the acts of the agent."

The instructions were correct and should have been given. Fadner v. Hibler, W6 III. App. 539; Reynolds v. Ferres, 86 III. 570.

Error is assigned also upon the refusal of the court to give instructions Nos. 2, 4, 5 and 6, requested by the plaintiff. These instructions relate to the law of eviction. The court aid not err in refusing these instructions, for there is no question of eviction in the case.

eon, obligated to put iron bare in the two rear windows of the store, his failure to do so did not, in less, constitute an eviction, either autual or constructive. If Hogans defaulted in that regard, upon due notice and request by appelles and failure on the sear of Hogans to perform, appelles could have put the bare on the sincows his—self and charged the expense against the landlord's demand for rent. The obligation to put term on the windows would be on a parity of a covenant to regain. The breach of such a covenant does not amount to an eviction where the remant remains in full and complete enjoyment of the granices and holds over after the expiration of the lease.

For the errors indicated, the judgment is reversed and the cause remanded.



March Term, 1913, 110.

388 - 19382

WILLIAN WENDMAGEL et al., copartners se Wendhegel & Co., Appelless,

VE.

GEORGE T. HOUSTON et al., copartners se George T. Houston & Co., Appellants. Appeal from
Superior Court,
Cook County.

186 I.A. 39

MR. PRESIDING JUSTICE SMITH DELIVERED THE OFINION OF THE COURT.

This is an appeal from a judgment entered upon the third trial of this cause, a judgment entered on the former trials having been reversed for errors in procedure.

By agraement of counsel for both parties, made in open court at the commencement of the trial, there was submitted to the jury but one question, namely, the difference between the centract price of the lumber described in the contract sued upon, of \$41 per thousand feet, and the market price at Chicago of the 100,000 feet of white oak lumber, covered by the contract, in the month of November, 1905.

ante below, that the evidence of the plaintiffs is insufficient in law to sustain the judgment. It is urged in support of this contention that the plaintiffs feiled to prove by any of their witnesses and by competent evidence the market price of lumber described in the contract is Chicago ir November, 1000, and that none of the plaintiffs' witnesses qualified so as to be competent to give any opinion as to such market value. With this contention we cannot agree. No objections were made on the trial to the competency of the mitnesses to testify. The question as to whether the witnesses proved thesselves qualified as experts on value of white oak lumber in Chicago was not raised in any other may. The

lareh Term, Mist, ...

rigintiffe offered in syldence the contract and put six witnesses aron the stand she testified upon the ousetion of the market value of the luster described in the contract in Chicago in November, 1903, in quantities of 100,000 feet. These witnesses testified to values rancing from \$50 to \$52 per thousand feet. Defendants produced five witnesses in court and read the depositions of three others. The testimony of the witnesses produced by the defendants was to the effect that the market price of lumber in November, 1903, was \$40 per thousand first in quantities of 103,000 feet. There was no middle cround based upon the evidence of the parties between the prices maked by the withsesse for the claintiffs and the defendants. We cannot say that the award of the jury against appellants for the sus of \$200 was excessive. The question was one of fact for the jury, and the credibility of the mitnesses was for the jury. We find no substantial and real ground for helding that the verdict of the jury was asnifestly against the preporderance of the evidence.

It is further urged that counsel for plaintiffe, in his closing argument to the jury, indulged in improper reserve, bringing to the attention of the jury incompetent and excluded evidence. The record shows that, in his closing argument to the jury, counsel for the plaintiffs said:

"Gentlemen, you are entitled to look at this case, not only what has been actually procured, but from all the facts and circumstances that the evidence tends to prove, and I think that from all the facts and circumstances it is a fair deduction and not a radical conclusion, that if the price of this lumber had not gone up, the material would have been delivered. Why not?"

This statement was objected to by sounced for defendants and the objection was sustained by the court, and the remarks were stricken out. We think the ruling of the court was correct. The non-delivery of the lumber was conceded and there was no occasion for counsel to go into the question as to why the

Millian and the second s lumber was not delivered. We cannot say, however, that what transpired before the jury and the court, in view of the ruling of the court, injuriously influenced the jury against the defendants in their version. The verdion tears no evidence of being the result of passion or prejudics.

It is further urged that the defendants did not have that fair trial guaranteed to then by the lew. The chief basis of this contention as presented in argument event to be that a witness, Crissinger, was called by the elaintiffs in rebuttal, and testified that he lived in Chloage and was a manufacturer's agent for hardwood lumber, and in November, 1903, was employed as a salesman by the defendants, and that he knew Mr. Harris, who was at that time connected with defendants. He was then asked, "Did you ever have any talk with his (Marris) about this cale of this lumber in Novamber, 1903?" This question was objected to a 1 -muterial to the issues in the case, and counced for plaintiffs stated, "I propose to show by this situees that Barris ministed that the value of this lumber during the year 1903 was \$4, \$5 or \$6 more than that price." The court austained objections to the question and the offer. The ruling of the court was obviously corract. The evidence offered was inconstant and insuterial, but as connot say that the sere element of sixt the plaintiffs grojourd to show by the witness could or did in any wise affect the jury. We find no reversible error in the record. The judgment is affirmed.

AFFIRWED.

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328 - 20283

SAMUEL L. WRIGHT, Defendant in Error,

Ve.

ASTON J. CERMAK, Bailiff of the Municipal court of Chicago, and H. P. CULLEN,

Defendants, ANTON J. CERMAK, Builiff, etc., Plaintiff in Error. Error to
Municipal Court
of Chicago.

186 I.A. 41

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment against plaintiff in error and in favor of defendant in error for \$8.75 and costs.

Plaintiff in error, Anton J. Cermak, as bailiff of the Municipal Court of Chicago, lavied upon a certain automobile belonging to Samuel L. Wright, the defendant in error, under an execution assinct W. B. Durane and A. T. Tachburns. Flaintiff in error removed the automotile to a varshouse and stored it there until it was returned to the plaintiff below, Fright. Immediately after the usizure of the sutomobile, plaintiff tright ande demand on Cermak, the bailiff, for the return of the automobile, and that being refused, he consended a proceeding in the Municipal Court of Chicago under Section 311-4, Chapt. 37, of the Revised Statutes on courie, making Carak and the execution creditor, R. A tring ras had in that F. Cullen, Tarties defendent thereto. proceeding, resulting in a judgment in favor of the plaintiff aslow, defendant in error here, for the automobile, and he was awarded an execution therefor and for the quats of the proceedings. a rehouse receipt for the subparobile was thereupon turned over to Wright, plaintiff below, by Cernak, se balliff, and when the plaintiff below called at the marchouse for his automobile, he was

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 compailed to may \$8.75 to the warshous. In for storage charges Aright thereugen commenced the ection against Carnak and R. P. Gulien, oldining \$15 for attorney's fees for asrvices performed by him attorney in the proceedings above mentioned, and \$8.75 which he paid the warshouse man.

On the trial, plaintiff Wright proved the payment of the \$8.75 to the sarehouse man, and offered to prove that he had retained an alterney in the trial of right of property proceedings, and that the attorney had performed services therein receonably worth \$15. The last item only was objected to as not a groger element of damagee and the objection was austained by the court. Plaintiff in error, Curmak, objected to the introduction of any evidence on the part of esight, defendant in errors and at the completion of the svidence of the defendant in error, soved the court to strike all such svidence on the ground that the action of defendant in error was barred by reason of the fact that he made commenced and prosecuted to a final judgment in the Municipal Court of Chicago a trial of right of growerty proceedings, and had obtained and accepted the benefits thereof. These objections were overruled by the court. Plaintiff in error, Carnak, then subsitted to the court three propositions and requested the court to hold thee as law in the decision of the case, which propositions were as follows:

"The plaintiff herein had but one cause of action for the wrong committed, though a choice of remedies, and the following of either is a bar to the others."

The court refused to so hold and entered a finding against the plaintiff in error and his co-defendant and judgment

[&]quot;A resort to the statutory action of a trial of right of property and a recovery aberein is a salver of an action against an officer for trespass for grongfully levying ar execution."

[&]quot;The plaintiff having commenced and prosecuted to a judgment in the Municipal Court of Chicago a trial of right of property proceeding, and having accepted the benefits of the judgment entered therein, has thereby precluded himself from maintaining this action."

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for \$8.75 and costs.

It is here urged that the plaintiff below, having commenced and prosecuted to a jumpment in the Municipal Court of Chicago a crief of right of property proceeding and having accepted the henefits of a judgment entered therein, has thereby procluded himself from saintaining this action, and that the court errad in refusing to held the propositions of law above stated.

In our opinion, the contentions of the plaintiff in error here are not sound in law. The court did not err in refusing to hold the propositions of less submitted by the plaintiff in error. The question here involved is not a new one. It has been before the courts of review in the following cases, and the holding was against the contention of the plaintiff in error; Hickard v.

Thrasher, 65 III. 478; People v. Crowe, 130 III. App. 348; Jones v.

People, 19 III. App. 300; Ilg v. Burbank, 59 III. App. 201.

The judgment is affirmed.

AFFIRMED.

CONTRACTOR OF THE STATE OF THE and the second s the contract of the contract o

March Term, 1913, No.

331 - 19345

STURGES & BURN WANUFACTURING COMPANY,

Appellant,

VS.

ROOT DAIRY SUPPLY COMPANY, Appelles.

Acpasi from Municipal Court of Chicago.

186 I.A. 52

MR. JUSTICE BARNES DELIVERED THE OFFICE OF THE COURT.

This suit was brought by appellant, the plaintiff, to recover the unvaic belance of the parchage price of milk and other cans furnished and delivered to a pelies, the assendant. The amount of said balance, \$1405.05, was unquestioned. ent sought to recoup damages for an alleged branch of contract. The jury gave a verdict for laintiff for \$500, thereby finding for defendant to the extent of the difference. The total amount of defendant's demages, however, as claimed and proven, was \$337.31 less than the jury .llowed it. Apuelles contenis auch allowance is justified on the theory of exemplary damages. Weither in the clearings nor troof is there basis for such contention. They present nothing in the nature of malice or weaton or wilful misconduct. The only question presented is whether in quality and weight, the cane were such as appellant contracted to formish. On the record, therefore, plaintiff was entitled tole larger judgment and for that reason, if for no other, the cause must be remanded for a new trial.

But, we are of the opinion that the preponderance of the evidence was against defendant's claim of a breach of warrenty. Such claim resis mainly upon the contention that it sought the milk came relying on representations as to the weight contented in appallant's catelogue of 190c. The record clearly shows that the purch so was made after the receive and exemination

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tains no such representations. Defendant's order was given in its letter of July 31, 1911, which refere to plaintiff's new catalogue, saying "Your new one is quite an iscrovesant over the eld one," and calls for twelve copies thereof. It purports to be in response to plaintiff's letter of July 98th, which informed defendant that allusions in one of its erior letters were evidently ossed on an old catalogue, and that plaintiff was sanding a copy of its new and latest one, and made the offer thus availed of in defendant's said answer to send as many more as asfaniant might have use for. Under such circumstances, defendant cannot be heard to say that its order was given on the strength of representations in the old catalogue. The order also was for the style of cans as designated in the new catalogue.

But, if there was any warranty as to the weight or quality of the cane, it was not such as would survive acceptance of the goods. A cirioso of the came was received by the defendants August 14th following the order. Defendant noted on the invoice, amounting to \$1807.27, the vorce "Quality O. K." Later on, August loth and October 7th, two small chipments of goods of the same kind, invoicing less than \$50 each, were made. Defendant proceedsd to sell the goods, and disposed of a portion of them. On November 10th, cofendent wrote plaintiff, "Shall reach your account tomorrow, and make settlement as agreed." November 14th, defendant sent face "to apply on account," and assured planariff that the balance would be teken care of after the 16th. After receipt of the goods asseral requests for resittances were reserved by defendant without com laint as to the character or quality of the goods de livered. In a letter of November 20th, defendant cought a modification of the contract, claiming insullity to complete with rival concerns. In raply thereto, November 22nd, plaintiff insisted

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that the terms of the centract be complied with and the bulance one thereon be paid as promised. It was not until after such correspondence that defendant even criticised the weight and quality of the cens. In its letter of Nevesber Jath, it complained that they were lighter and not se well timed to cens of their compatitors; but there was no allusion even thee or in prior correspondence to a warranty or breach thereof.

The mutters complained of were light weight and poor timming. Neither could be reserved se a latent defect. Both were readily a garent or ascertainable on inspection if they exist-Complaint should have been made within a reasonable time after receipt of the goods. (Benjamin on Sales, Sec. 705, 7th Amer. Ed.]). From the record the conclusion is irresistible that there was an acceptance of goods delivered under an executory contract after an opportunity to inspect them. Under such circumstances, there being no proof of freud or of an excress warranty by the vendor, duagess because of the inferior quality of the goods cannot be recouped. (Titley et al. v. Enterprise Stone Co., 127 Ill. 457; American Theatre Co. v. Siegel, Cooper & Co., 231 id. 145; Norton v. Dreyfuss, 106 N. Y. JO; Studer v. Pleistein, 115 id. 317.) If the goods were not of the character and quality called for by the contract, there was a waiver of the alleged defects by defundant's acceptance thereof. (Defencaugh v. Weaver, 87 Ill. 152.)

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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arch Term, 1913, No.

338 - 19352

METTIE L. SPERCER et al., Appellante,

VO.

THEODORE C. MUELLER et al., Defendante

C. M. ANDERSON AND A. W. ANDERSON co-partners, stc., Appallees. Appeal from
Sucerior Court,
Cook County.

186 I.A. 53

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants filed their bill to foreclose a trust desa securing cortain notes executed by Theodoro C. Wueller whi Anna, his wife, owners of the conveyed presises, on which they contracted for the erection of certain improvements. Spencer was the holder of the notes; Lang was the trustee and also occupied the relation of contractor for the improvements. Anderson Brothers were the subcentractors and were made defendants in the bill. In their answer, in the nature of an intervening petition, they set up a claim to a machanic's lien, which was filed March AC, 1910. Amended potitions were subsequently files, issue sing taken on the one filed June 28, 1919. The latter petition alleged that the last work by the subcontractors was done March 23, 1912, and the notice of their claim of lish against anid process was served Earch 25, 1912. The service see made on Theodore C. Mueller only. It also appears and is so found in the decree that Spencer was holding the notes for the benefit of said Lang. A Mechanic's lien was decreed against the premises and it is from that part of the decree that this appeal is taken.

It is contended, first, that the proceeding to enforce the lien was presaturely trought. This contention is based on



Sec. 28 of the Machanic's Lian Act of 1903, which provides that if a subcontractor has not been paid within ten days after service of the notice required by the act, he may either file a netition to enforce his lien, or sue the owner and contractor jointly for the amount due him. Under Sec. 34 of the act, the owner is entitled to ten days' notice of said claim. The contention is that the proceeding to enforce the lian are commenced even before service of said notice. If appellants can raise this quaetion, yet, nore than ten days slaped after nervice of notice before the amended petition of June 28, 1913, was filed. It was in the lower of the court to permit Anderson Exothera to intervene at any time during the lendency of the original proceeding. This question would not arise had they first sought such right on June lath. It was by lease of the court the they arended and filed a new petition on that date. Their processing for enforcement of the lien, therefore, was, for all practical purposes, cameaned at that they and ar ellents so reparded it, for they proceeded to take issue on said acendes petition. It is asrely a technical question, for no substantial right of uppellants is affected nor have they any such interest in the property as entitles them to raise the question. The notice was for the banefit of the owners of the property, and they are not complaining and have appliced no crosserrors.

It is also claimed that because there was personal service of said notice on Theodore C. Mueller only, the decree erronscealy provides for a sale of his rife's interest also. But of this we do not think appellants can complain. Under said act, the lien would attach to the lands and improvements jointly owned by bushand and wife even though the contract was made with only one of them. (Sec. 3, Act of 1903.) Here it was made with both. Hotics having been served on Theodore C. Mueller, it is not questioned but that the decree was good as to his interest. It would re-

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quire the same amount to redeem from a sale thereof as it would from a sale of the interest of both owners. No greater burden is cast on appellants and no right of theirs being jeopardized, they have no ground for complaint.

To think all the requirements to setablish the lien were proven, and that the decreeshould be affirmed.

APPINUED.



March Term, 1913, No. /9366

A. C. MCCLURG & COMPANY, Appelles,

WE.

HERBERT O. TOWLINSON et al., Appellants. Appeal from Municipal Court of Chicago.

186 I.A. 55

WR. JUSTICE BARRES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the plaintiff (appeales), who sued defendants (appeales) for the purchase price of aestain books sold and delivered to the latter, among shick was a set of the works of Charles Dickens. Defendants claimed that plaintiff serranted such set to be a complete set of first soltions of his jublished works. The claim was disallowed.

The contract of cale was in writing. It was embodied in four separate documents,— a latter to defendants from plais—
tiff's agent, George N. chandler, written from London, July 6, 1809,
describing the set in question, and stating the torse on which it
could be had; an enclosure theresith from one of claimtiff's catalogues; a cablegram from defendants to Chandler, usted July 17,
1900, asying, "Buy Dickens and latters," and their latter of July
33rd, confirming the cablegram.

Which of the evidence bearing on the alleged breach of warranty was received on the theory that the contract was sebi-

Prior to Chandler's visit to London to buy books for plaintiff, he had a conversation with defendants about rare broke and first editions in which they at times deals, and agraduate report as to sets he thought they could use. There is a disagrament he to the substance of the conversation; but whatever

the same of the sa AND A SECOND CO. NO. OF CO., NAME AND ADDRESS OF TAXABLE PARTY. served by a reverse of it was to be a little

it was, it was not admissible to explain a complete and unanxiguous written contract, the int not and meaning of which is to be gathered from the entire contract, and in which, of course, all previous conversations relating to its subject-matter were surged. We sufferities need be cited on such a fundamental proposition.

Nor was expert evidence as to the meening of the morns "complete set " necessary to an understanding of the contract.

It contained no ambiguity, nor a warranty that the set sold was a "complete set of First Editions."

The letter of July 6th, so far as pertinent, rade:

"I am pleased to report that I have found a set of First Editions of Dickens, 67 volumes in the original bindings as published. The titles and dates correspond with the set we had several years ago, a description of which we enclose here ith, Gut from one of our estalogues. The set is in fine condition.

"Have ecoured an oction on the set for two weeks. Will you therefore please cable me should you decide to have see buy and bind it for you - complete sets are exceedingly scarce and difficult to make up and I would strongly recommend you to let me secure this one for you. * * * **

The partiment part of the 'out' referred to reads as failuse:

"Dickens (Charles) Works, including his Life. Complete set of First Editions, with all the great number of
clever illustrations, * * 67 Volumes * * * sumptupusly bound
by Riviers in * * levent morocco * * * nearly all the
volumes with the original cloth or paper covers bound in at
the ends. London, 1858-82. \$2,000.00.

The Set Comprises - - "
(Here follows a special description of ever volume with details to to
illustrations, binding, title, date of publication, etc.)

The only pertinent part of defendants' confirmatory letter reads, "I am mending this letter slong as a confirmation of the cablegram, authorizing you to purchase for us the first addition of Dickens, sixty-seven volumes, to be bound by Riviers in red levent."

From the foregoing, it is perfectly clear that all Chandler represented he had found was a set of first editions of

i inc ____

Pickens in sixty-seven volumes, corresponding to the set described in the 'cut' as to titles and dates. The only purpose of sending the list was to inform defendants what was comprised in the set.

To be sure the writer of the letter expressed an opinion that "complete sets are exceedingly source," but he did not represent that the set in question was a 'complete est,' in whatever senes he may have employed the term, or that the sixtycoven volumes as listed constituted a complete set of first editions. While the cut from the catalogue, containing the list, refers to "complete set of first editions," nevertheless Chandler referred to it for no other purpose then to she within and univer of the volumes as there described. Defendants were not misled. By consulting the list, they could excily have actors and what works of the author were included in the set offered to them. Whatever significance may be s'tacked to the mords "cor: lete est " in ther connections, here, if they have any significance other than a mare expression of orinion, they can be deemed nothing more than words of general description, referring to and controlled by the specific spuseration of the volumes is said list. (Sicke) v. Stevens at al., 18 Vt. 111; State, ex rel. Menofield v. Mayor of St. Paul, 34 Minn. 250.)

but as used we think they constituted a mere expression of opinion. It a pears from the 'setimony that expert book-can differed as to their real significance. Defendance were not novices in the book trade or in dealing with rere and expensive additions of authors' works, and if the words had reference to the set as described in the list of do not think the latter can be regarded as asserting comething of which they were ignorant or on which they relied. It will not stand the test of a warranty. (Adams v. Johnson, 15 III. 345; Kenner v. Harding, 85 id. 264; Roberts v.

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Apr legate, 153 id. 210.)

It is further claimed by defendants that in a conversation, after Chandler returned, he guaranteed the set to be a complete set of first editions. Chandler denied making any they much attracents; but, if made/mare in defectle, for a urch ser cannot avail bimself of a parol warranty where the contract of sale is in writing, (Telluride Co. v. Crane Co., 208 Ill. 218; Robinson v. McNeill, 51 id. 225; Graham v. Elezner, 28 Ill. App. 289) and if there was any such warranty given in a subsequent conversation, it would have required a new canaid ration to support it, and none was proven.

There was nothing about the proposition that was incomplete, uncertain or ambiguous. It needed no explanation to make its terms intelligible. It was a proposition on one side to sell certain specifically enumerated and described works of the suther Dickens and an acceptance of it by the other, and we find no room therein for the contextion by appellants that there was a warranty the it was a complete set of first edition a of the author or that the goods delivered were not in accordance with the contract.

The judgment is affirmed.

AFFIRMED.

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March Term, 1913, No. 356 - 19370

PEOPLE FOR THE USE OF JACOB GLOS, Appellant,

VB.

PETER B. OLSEN, County Clerk, et al., Appellees. Appeal from Circuit Court, Cook County.

186 I.A. 57

MB. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order sustaining a general denurrer to a declaration alleging a breach of the official bond given by Peter B. Olesa, as county clark of Cook County. Many questions are discussed in the briefs which we do not deam it ascessary to consider. Assuming for the sake of argument, that an action would lie on a county clark's official bond for such breaches as plaintiff attempted to declare on, asvertheless, such count was insufficient in that it did not state facts from which the court could determine whether there was any treach of official duty.

Sixty-nine breaches are attempted to be set out in the declaration in as many counts. The first sixty-three are hased upon the claim that the county clark charged and collected excessive fees for the issuance of tex deeds and for recording the evidence upon which they were issued.

Section 222 of the Revenue Act provides:

"County clerks shall record as evidence upon which deeds are issued the application, all affidevite and notices filed with the application, the certificate of sale, and all other documents and papers filed in compliance with law, and be entitled to the same fee therefor that may be allowed by law for recording deeds."

In no one of the counts is there alleged what asount or fee the county clark could legally have required for recording such evidence. In the absence of such an allegation, it is impossible for a court to determine whether or not the fees required and al-

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leged to have been paid were excessive. For that reason alone the denurrer to the first sixty-three counts was properly suctained.

The remaining six counts were based on the claim that in each deed issued on the affidevite required as a foundation therefor the county clerk included but a single parcel of land instand of several, thus causing an increased cost to the relator for record of the tax deeds in the recorder's office, and alleged that the relator, as applicant for the tax deeds, was entitled to have a certain number of lots included in each deed, but that the county clark included in each only one lot or tract of land, and "that his acts and doings in that behalf were unlawful and opprescive." Luch allegations were cere conclusions. There was no eliegation of fact from which the court could infer whether sore than one lot should have been included in a tax deed or not. For aught that appears the issuance of the deeds was strictly in compli nos with the second provise of fection 220 of the Revenue Act, which directs that the clerk small include in a deed not to exceed one lot, etc., ascessed and sold in one description, except in cases where such lot, etc., is owned by one party or person. There was no allegation to show that in any application by relater the facts presented prought the case within the exception referred to.

The judgment will be affirmed.

AFFIRMED.

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March Term, 1913, No.

201 - 19303

CLARK W. HAWLEY.

Appellee,

VS.

E. O. NOCORNICK,

Appellant.

Appeal from Wunicipal Court of Chicago.

186 I.A. 58

ND. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

A recovery of judgment was had in this case by the appelles (plaintiff) spainst the appellant (defendant) upon an oral contract alleged to have been made by the plaintiff with the defendant wherein, as alleged, defendant agreed to pay or dauge to be paid to the plaintiff the purchase price of certain lance bought by the plaintiff from a Mr. Moddel if plaintiff becase its satisfied with his contract.

It appears that the defendant had agreed with a Wr. Awarus that if the latter purchased certain lands from Mr. Mc-Doel in California and afterwards became disentiafied with his contract, the former would "take his out" of the deal, as we understand the record, either by taking the property hisself or causing it to be taken by a corporation of which he was a stockholder and which has engaged in celling the McDoel tract of land.

The case of the plaintiff rests upon the testimony of Andrus, who stated that McCormick had made a similar agreement with him (Andrus) with respect to the property bought by Dr. Hamley, who was a friend of Andrus. McCormick denied ever having made such a contract as to the Hawley purchase, and stated that the reason for his making such an engagement as to the property bought by Andrus was that Andrus was an old friend of his and had been in ill hablth. It appears that Andrus Second discatisfied with his purchase and that McCormick relieved his of his

contract in accordance with the agreement. We find in the record no evidence upon the essential feature of the case, other than that of Andres and McCormick which, as stated, was in direct opposition.

We think the judgment should be reversed for the erroneous ministion of svinence with regard to the quality of the land. while in the second asended statement of claim it was stateed that a fendant represented to disintiff that the land ase out able for agris orchards, this did not change the cause of setion from one in contract to one in tert. An action for tort may not be brought in the Woniginal Court where the assent claimed is sore than \$1,000, as in this case. The evidence was improperly admitted technolog if McCorsics had unde a contract with Restry ories to the purchase by Hawley of the land, as claimed, it was entirely immaterial for what reason Hawley become discattefied and required rapayment by NoCoralck. The evidence taken, which was considerable in amount, as to the kind of soil, etc., the alleged insbility to raise applies on the land, was necessarily very heraful. It is true that evidence in reductal saw offered and the plaintliff's witnesses cross-examines. The justiff, however, is not in our opinion supported in the proposition that this constituted a salver of arror by the defendant. The case is estirely unlike those sited in which the first evidence on the subject was offered by a party who complained because similar swidther sit of terrords introduced by The evidence being so nearly at least aqually balhis adversary. anced, the jury might easily have been led setrey by this evidence upon an issue not properly before it.

For the error pointed out the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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March Term, 1913, No.

L. FISH FURNITURE COMPANY, a Corporation, Appellant,

VE.

CHARLES R. HORRIE, trading as HANDOLPH WARKET & GROCERY, Appellee.

Appeal from County Court, Cook County.

186 I.A. 64

MP. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

for \$635, claimed to be the smount due from appellant (plaintiff)
for \$635, claimed to be the smount due from appellas (isfendant)
for a quantity of trading etamps. A special notice of defense was
attached to the plan of the general issue and the affidavit of
serits, in which it is said: "and further, defendant viil give in
evidence and offer to prove that he has never refused to pay alsintiff according to the terms of said contract and that he now does
offer the said plaintiff the sum of one hardred and forty-five acllars, being the amount due to the plaintiff from the defendant
under the terms of said contract," etc. Notwithstanding this admission of the amount due, the jury found a verdict in fevor of
the defendant, and judgment was entered in his favor for costs.

The contention of the defendant that the judgment should be affirmed some to be based solely upon the proposition that defendent offered a check to the claimtiff for the sum of \$145, which was refused by it because insufficient in asount. The alleged tender was not kept good by payment of the soney into court or by an offer of it in ones court or otherwise. The judgment must therefore be reversed and the cause remanded for a new trial.

We find it unnecessary to treat of other matters discussed in the briefs.

REVERSED AND REMANDED.

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March Term, 1913, No.1

310 - 19321

IDA W. HEATH,

Aprelles,

VS.

CITY OF CHICAGO, Appellant.

Appeal from Circuit Court, Cook County.

186 I.A. 65

WR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

In this case judgment was obtained by appelled as plaintiff against the City of Chicago, appellent, as defendant, for personal injuries elleged to have been sustained by the plaintiff torough the negligence of the City in maintaining a defective and dangerous sidewalk.

The grounds urged for reversal of the judgment are, that the verdict was against the sanifest weight of the evidence; that the plaintiff was guilty of contributory negligence; that the court erroneously refused to submit two special interrogetories to the jury; that a proper instruction tendered by the defendant was refused, and that an improper instruction tendered by the plaintiff was given.

The accident happened on February 17, 1911, between 10:30 A. M. and 10:40 A. M., on the north eide of Randolph street near Clark street in the city of Chicago. It is the contention of the plaintiff that the evidence shows that on December 13, 1910, the commissioner of public sorks issued a license to a contractor for the construction of a trapdoor in the side-alk, which trapdoor was about that time placed therein; that the side-alk at that point was of large stones, with openings out in the same for coal holes; that in locating the frame for the trapdoor it was necessary to out into and take out a square section of the stone sidewalk; that in order to close the part of the coal holes

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which otherwise would be left open concrete was used; that on the day of the accident there was a hole in the sidewalk which extended from the ris of the trapdoor frame eighteen inches along the frame sust and west, with a depth at the iron ris of the trapdoor of 31 to 41 inches; that at the time of the accident the sidewalk was crosded with people, which prevented the plaintiff from seeing the hole; that plaintiff stepped into the hole, fell and received very serious injuries. On the part of the City it is claimed that the sidewalk at the place in question was without lefect and that plaintiff's injury was due to a mere accident.

We have carefully read the testimony in the record and are unable to say that the weight of the swidence with respect to the City's negligence is not with the plaintiff. Nor are we of the opinion that the laintiff was not shown by the swidence to have been in the exercise of ordinary care at the time of the accident.

It is said that the court erred in refusing to submit to the jury the following interrogatories:

"First. Was the accident occasioned proximately by a defective plan of construction of the place in question?

"Second. Was the place of the alleged defect in the came condition on the 17th day of February, A. D. 1911, at the time of the accident as it was at the time of the construction?"

Neither of these questions related to an ultimate fact, and the refucel to submit them to the jury was not erroneous. The most that can be said of the interrogatories submitted is that they relate to merely facts that consibly sight tend, more or less, to establish the ultimate facts upon which the rights of the parties depend. Chicago & N. E. Ry. Co. v. Dunleavy, 129 Ill. 132; Chicago & Alton R. R. Co. v. Winters, 175 Ill. 203; Chicago City Ry. Co. v. Olis, 192 Ill. 514.

Two instructions tendered by the defendant are al-

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leged to have been erroneously refused. The secential feature of each of these instructions was covered by an instruction which was given, and the refusal to give additional instructions on the same subject was not error. Hor are we persuaded that the two instructions complained of which were given on behalf of the plaintiff were erroneous.

It is next claimed that the damages are excessive.

The amount of the verdict was \$5,950. It is not denied that the plaintiff was seriously injured; her hip was broken and the femurificatured. There was evidence tending to show that the injuries will be permanent and that glaintiff will never be able to walk without the aid of crutcles. Indeed, in the trief of the defendant there is no disjute as to the nature and extent of the injuries. We do not regard the verdict excessive in amount.

The judgment is affirmed.

AFFIRMED.

ALEXANDER FELMAN, Plaintiff in Error,

7B.

SENJAMIN SCHIFF, doing business as SCHIFF & CO., Defendant in Error. RRROR TO

MUNICIPAL COURT

OF CHICAGO.

186 I.A. 67

ME. PRESIDING JUSTICÉ PITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff in error sued the defendant in error in the funicipal Court, to recover \$200 which the plaintiff deposited in defendant's savings bank, and which the defendant paid out by mistake to a man who had found or stolen the defendant's passbook. Upon a trial before the court without a jury, the defendant had judgment and the plaintiff brings the case here for review. It appears that the plaintiff opened a savings account with the defendant in October, 1910, and was given a pass-book, upon the outside of which the following was printed in capital letters: "Take care of this book. If you should lose or mislay it notify us immediately." Upon the inside of the front cover, under the heading: "Rules Relating to Davings Deposits," three rules were printed, one of which is as follows:

"PAYMENTS TO NOLDERS OF PASS-BOOKS.

This bank shall not be liable for payments
made to any person who shall produce the deposit
book of the depositor, unless written notice shall
have, previous to such payment, been given to the
bank for or in behalf of the depositor that said book
has been lost, mislaid, stolen or otherwise passed
from the possession of the true owner thereof. Any depositor who shall prove to the satisfaction of this
bank that his pass-book has been lost, stolen or destroyed, and shall furnish to the bank satisfactory indemnity against any claim which may at any time be made
against the bank on account thereof, will receive, at
or after thirty days from date of notice, the amount
of this deposit or any part thereof, or a duplicate
pass-book. The bank may make payments to the depositor without the production of such book."

TRAIL REE

At the top of the first page of the book the following sentence was printed; "All deposits are made subject to rules relating to cavings." Under this statement were written the several amounts deposited and withdrawn, with the date stamped opposite such entry and the balances, written in words and figures. The book shows that during the year following the opening of the account, the plaintiff made deposits on twenty-eight different days and withdraw money on three occasions. The last deposit was made on october 18, 1911, after which the plaintiff's balance was [4.5. The plaintiff was an egg-candler, in years of ago, and kept his bank book either in his pocket or in the drawer of a dresser in his room in a boarding house. On October 19. 1010, a man resembling the plaintiff presented the plaintiff's buss-book it defendant's bank, and asked for (200. He wave the name and address of the plaintiff, and signed the plaintiff's "a " to a " sit drawal card." As these apparently corresponded to the mane, address and signature upon the "signature card" hent by defendant, the money was paid to him. The next day he came again and asked for the balance. Defendant requested him to "wait a winute." A moment later, he disappeared, leaving the pass-book in defendant's possession. Later the same day, the plaintiff discovered that his pass-book was sore, and upon notifying defendant of that fact, was told that 1200 had been paid out as above stated. It was shown that the plaintiff had never given anyone authority to use his pass-book or draw money for him from the bank. The bank refused to pay him the 1800, and this suit followed.

A rumber of propositions of law and fact were submitted to the trial court and marked "held" or "refused". From these propositions, it appears that the court found, as facts, that the amount in question had been withdrawn from the plaintiff's

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knowledge, authority or consent; that the signature of the plaintiff, as signed by that person on the withdrawal card, is a forgery; that there is not such a marked discimilarity betwee the forged signature and the genuine signatures of the plaintiff that a reasonably prudent person would have discovered the forgery by were inspection and comparison of the signatures; and that the defendant was not guilty of negligence in passing out the money, under the circumstances shown by the evidence. The court also held, as propositions of las, that shills the plaintiff was bound by the rules printed in his passinow, yet it was the auty of the defendant to exercise vig lance in passing money to any person presenting the plaintiff's book, and that the fact that plaintiff was negligent is immaterial.

It is claimed that the burden of proof was upon the defermiont to show that the plaintiff knew and understood the rules printed upon is pass-book, or that his attention was called to them and that he assented thereto. The plaintiff testified that he could not read English, that he had never real the rules and had never tried to read them. It appears, however, that the pass-book was in his possession for more than s ye r. that it had been frequently used by him during that time. in making deposit and obtaining sithdrawals; that he spoke and understood the English language, and that he wrote his name ir benlish characters, on the signature ourd and althdrawal cards. He admitted that he knew that he had to present the book in order to make deposits or to withdraw any money. As above stated, the trial court who saw and heard the sithesses, refused to Timi. from this evidence, that the plaintiff in fact had no knowl edge of the rules printed in the pass-book. If it be conceded that the rule of lew is as claims; by plaintiff's counsel, so would not be authorized to reverse the finding of the trial

sourt, sitting as a jury, in this respect, unless so were of the opinion, after an examination of the whole of the evidence, that the finding is manifestly centrary to the preponierance of the evidence. To are not of that opinion, and therefore it is unnecessary to decide whether the rule is, or is not, as claimed.

As to the legal effect of such rules, it is said, in Force on Lanks and Banking, Vol. 2, Sec. 320: "The regulations of a savings bank for withdrawing deposite, if properly made known to the depositor, are proof of the contract between him and the bank. They are intended for the protection of the bank and depositor against fraud and forgery, and it is generally hol: that such a regulation in the shape of a by-law enters into the contract of deposit, and binds the depositor. * * * One of the commonest rules is that the bank book must be produced in order to draw the deposit and that projuction of the book shall be authority to the bank to pay the person producing it. This is regarded as a reasonable and binding regulation, and if the bank pay to one having the book, there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good, as a But the bank must exercise reasonable care." This statement of the law is supported, in whole or in part, by the following cases: Donlin v. Provident Institution for Savings, 127 Mass. 183; Chase v. Jaturbury Bank, 77 Conn. 298: Luciel v. Bermania Lavings Sank, 127 N. T. 488; Cosgrove v. Provident Institution for Savings, 34 N. J. L. 655; Gifford v. Butland Javings Bank, 63 Vt. 108; Jurrill v. Bollar Savings Bank, 82 Pa. St. 134: Toline State Savings Sank v. Lingett, 108 Hll. App. 813. Plaintiff's soumsel does not seem to seriously dispute the doctrine thus stated, but upon the assumption that such is the law applicable to the facts of this case, he insists that the circum-

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stances under which the 1200 payment was made were such as to excite suspicion, and that therefore a payment under such circumstances without making further inquiry was negligence on the part of the defendant. The circumstances relied upon are (1) that the forged signature is (it is claimed) entirely different from the plaintiff's signature on the signature card, and (2) that the evidence is that the forger first asked for two dollars and w on his found this request was going to be allowed, he asked for two hundred dollars. As to the latt r circumstance, the evidence marely shows that when the imposter presented the passbook, he was asked by the cashier how much he wanted, and he said "two"; that the cashier wrote the figure "J" in the passbook, when the man said: "No, two hundred dollars:" that the cashier then wrote beneath the figure "2" the figures "104", asked him his name, address and other questions, then asked him to sign a .ithdrawal card, compared the signature with the signature card, and finally paid him the money. The cashier testified that the man who presented the pass-book resembled the plaintiff. was apparently about the same age and correctly answered the questions out to him. As to the other alleged suspicious ircumstance, we have compared the signatures on the gards (which have been certified as part of the record) and we cannot say, from our examination, that there is any such marked dissimilarity in the simpatures as to excit. suscicion. No two of the signatures are exactly althe in all respects, yet four of ther are admitted to be senuire. After due consideration of this evidence, in the light of the plaintiff's contentions, as earnot say that the finding of the trial court upon these questions of fact, is manifestly contrary to the weight of the evidence.

Finding no reversible error in the record, the judgment of the Eunicipal Court will be affirmed.

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MACHAN SLOAN, doing business as hathan stand score for use of FIRST NATIONAL BANK OF CHICAGO, Defendant in Error:

vo.

BOSTON INSURANCE COMPANY, a corporation,

Plaintiff in Error.

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MUNICIPAL COURT

OF CHICAGO.

186 I.A. 81

MA. PRESIDING JUSTICE FITCH DELIVERED THE COURT.

In this case, the plaintiff brought suit against the defendant upon a fire insurance policy for 1,000. Plaintiff was a manufacturer of ladies' suits and clocks, and occupied the seventh floor of a fire proof building on Market street, Uhicago. He carried insurance amounting to \$17,000 upon his steck of merchandise, represented by seventsen policies of 1,000 each, ismued by different insurance companies. His statement of claim alleges that the property insured was destroyed by fire on Decembur 4, 1010, whereby he sustained a loss of \$24,003.00: after the firs he made proofs of loss: that thereafter an appraisement of the amount of his loss was made by three appraisers appointod in accordance with the provisions of the insurance policy; that such appraisers fixed the sound value of the plaintiff's property at the sum of 111,500, and the loss and damage thereon at the same amount, but that defendant refused to pay the same. Upon a trial before a jury, a verdict sas rendered for the plaintiff for 710.7%, being one-seventeenth of 11,580, with interest; and from a judgment entered upon that verdict defendant brought this writ of error.

It appears from the appraisers' report that they stated the value of the property in two separate items. In the first item, the appraised value of "ladies' suits, skirts and jackets" was given, and in the second item the value of "furs and skins".

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It is sentended by defendant's sounsel that the insurance policy does not sever fure and skins, for two reasons: first, that they are not described in the policy, and second, that plaintiff was not the sole owner of the same.

"1,000 on stock of merchandise consisting chiefly of ladies' suits, skirts and jackets, manufactured and in precess of manufacture, and all materials and supplies used in the manufacture of the save, their own or held by them in trust, or on commission, or sold but not removed from the premises, and on all labels, sample cases, packages and cases, all shile contained in, on and attached to the basement fireproof builting, and on and under sidewalks belonging thereto, situate Nos. 181 Market St., Thicage, illinois." Among the general printed conditions contained in the policy is the following: "This entire policy, unless otherwise provided by agreement endorsed hereon or added thereto, shall be veid a manife in the interest of the insured be other than unconditional and sole ownership."

It appears from the evidence that after the insurance policy was written, and about nine menths prior to the fire, the plaintiff entered into a written contract with a Jealer in fure and shine, under which goods of that character were to be shipped to the plaintiff and held by him "on memorandum", to be seld in the name of the dealer at a price fixed by him, and that the profite on such sales should be divided between them in certain proportions. The contract also required the plaintiff to keep all such property fully insured.

that "he word 'merchandise', as used in the form of this policy, means all merchandise carried in stock by Nathan Sloan & Company, or Nathan Sloan, doing business as Nathan Bloan & Company, either owned or held in trust or on commission; and the insurance is not

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limited to ladies' suits, skirts and jackets." The words "stock of morchandise" as used in the policy are broad enough to cover such furs and skins as were carried in stock by the plaintiff. The qualifying words, "consisting chiefly of ladies' suits. skirts and jackets", were evidently intended to characterize the general nature of the merchandise handled by the plaintiff. and not as a definite specification of particular articles or materials, to the exclusion of all others. The sords sheld by them in trust" were construed in Home Ins. Co. v. Pavorite, 43 111. 250. as covering property that is not owner by the insured. but entrusted to him by others and which is in his possession at the time of the fire at the place described in the policy. by the agreement between the plaintiff and the dealer above mentioned, the plaintiff did not become the owner of the furs and skins shipped to him by the dealer. He was merely given the right to the possession of the same, as the factor or sellingagent of the dealer. The fact that the plaintiff's compensation for making sales was fixed at a certain proportion of the profits instead of a stated commission, did not make him a partner of the dealer, except, perhaps, as to the profits. It was the property that was insured, not the profits. It follows that the genoral claus. in the policy as to unconditional and sole comership must be construed as being qualified by the special provision covering property held by the plaintiff "in trust or on commission."

It is further contended that the evidence shows that the plaintiff wilfully and falsely stated the amount of his alleged less; that he made false statements under oath when examined in relation to the same; and that he was guilty of such wilful fraud in these and other respects as to preclude a recovery.

These are questions of fact which were submitted to the jury and their decision was adverse to defendant's contention. The defendant's motion for a new trial was overruled, however, and error is

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assigned upon that ruling. This trings up the question whether the court erred in so ruling. "If a vertist is manifestly
against the weight of the evidence, it is the duty of the
trial judge to set it aside and grant a new trial, and a failure to be so is error, for which a judgment must be reversed."
(Denelson v. E. St. Louis Ey. Co., USS 121. 825.)

The fire in the plaintiff's premises occurred a little after midni ht. As mearly as we can ascertain from the evidence. the fire had burned possibly half an hour before an alarm was given, and was not out within flye rimutes after the firemen arrived. The avidence is meantically undisputed that saids from offects caused by pmoks, water and heat, the damage from the fire was confined to a space approximately 15 by 80 feet in area, near the center of the promises ogmined by the plaintiff. The plaintiff testified that most of his stock was located "about the center" of the previses. The total area of the floor occupied by him was 30 by 90 feet, of which the front third was used as an office and salasroom, and the remaining two-thirds were use! for factory purposes. The office was separakel from the factory by a wooden partition about sir feet high. the building fronts west and the fire started near the northwest corner of the factory part of the premises. In the factory wore a number of course machines and sutting tables, and there were other tables and shelving upon which goods were piled. The fire consumed a small portion of the factory floor (about 7 by ? feet in all), scorehad the alde walls and seiling and one or two of the tables: but no part of the wooden partition was burned through, and not one of the tables was destroyed. The proofs of loss, as presented to the Insurance Company, began with the following item: "Jonuary 1, 1910, Inventory as per books, \$15,994.79." To this item was added \$52,639.83, as the total amount of "purchases as per bills and books", and "labor on



garments", from January 1, 1910, to the date of the fire. From the aum of these two items was subtracted the gross amount of sales during the same period, less ascertained profits and merchandise in possession of traveling men, leaving a balance called "Value of stock at time of fire. 25,731.21." To this statement of value was appended a "list of roods remaining in sight" after the fire, the original value of which is scheduled at \$4540.35. When this claim was presented, the defendant's adjusters asked to see the plaintiff's books. The plaintiff submitted all his books for the years 1000 to 1000 inclusive, but submitted none for the year 1009, except the stubs of his check books. The adjusters asked to see his acocuat books for 1000, but the plaintiff claimed they had been lost or destroyed. In the middle of one of the books submitted, the adjusters found a statement covering ter pages, headed: "Inventory from Grear Book, July 10th, 1800", which apparently showed that on that date the plaintiff's total assets were 17935.22, and that he owed \$3002.80, leaving a net balance of 11545.3%. A copy of the main items of that inventory was made by the company's adjusters. Ten days later, the adjusters again asked to see the book containing that inventory. The book was produced, but in the mountime, the pages containing the inventory of July 10. 1909 had been cut out of it. The plaintiff was ther examined under oath, in pursuante of the provisions of the policy. He denied all knowledge of the inventory of July 10, 160%, and denied all knowledge of the matilation of the book. then the copy made by the adjusters was produced upon the trial, however, he claimed the entries out out of the book were not intended as an inventory, but were merely some memoranda made by him for different purpose. A computation was made by one of the dompany's adjusters, based upon these memorands (treated as at inventory) and the stubs in the plaintiff's obeck books, sover-

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ing the period from July 10, 1900 to January 1, 1910. This so putation to do to show that it the missing remorantum was in fact an inventory (as it appears a d purports on its face to be) and was correct at the time it was made, the value of the plaintiff's stock on hand on January 1, 1910 could not have been over half the amount stated by the plaintiff in his proofs of loss. If the missin inventory be assured to be correct, and the computation of defendant's witness be accepted as accurate, than the amount fixed by the appraisors as the value of the plaintiff's stock on hand at the time of the fire, would seem to be approximately correct. On the other hand, if the proofs of loss, as submitted by the plaintiff, be accented as true, then it Pollows, necessarily, that over 500,000 worth of ladies' suits, cloaks, furs and skins must have been so completely and utterly destroyed in a fire of less than an hour's duration as to leave no trace shatevor "except sand and ashes", though the tables on which they sers piled and a scoder partition, less than twenty feet away, were only ecorohed. This conclusion is so palpably abourd that even the plaintiff himself did not youch for its truth upon the mitness stand. Then he was asked the direct question: "That became of the difference between 14040.3%, being the sound value of the goods remaining in sight after the fire, and 1.4,711.21, which you say was the sound value of all the stuff before the fire", the plaintief rerely replied: "I presume it was destroyed by fire." It is not contended, nor could it be successfully claimed, under the facts of this case, that the mere fact that the appraisers reported the amount of the alleged loss of the plaintiff to be 11,000 provented the defeniant from proving that the plaintiff did not have on hand at the time of the fire and in his possession at the previses described in the insurance policy, the goods be claims were so completely and utterly destroyed. The agreement



under which the appraisers were appointed does not give to their report any such conclusive force or effect. It seems probable, however, that the jury may have noted upon some such erroneous assumption. After a careful examination of all the evidence in the record, we are anable to ascape the conclusion that the verdict is marifestly contrary to the weight of the evidence. We are of the opinion that the trial court erred in overruling the defendant's notion for a new trial, and for that reason the judgment of the Eunicipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.



MATHAN LLOAR, deing business as MATHAN SLOAN & COMPANY, for use of FIRST MATICWAL SANK OF CHICAGO, Defendant in Error,

1861.A.82

ERHOR TO

MUNICIPAL COURT

OF CHICAGO.

VO.

QUEEN INSURANCE COMPANY OF AMERICA, a corporation,

Plaintiff in Error.

DELIVERED THE OPINION OF THE GOURT.

rhis case is controlled by the decision in <u>sloan</u> v.

<u>roston insurance Company</u>, Sen. No. 19,120. It was tried by
stipulation upon the same record as in that case, except that
the loss sued for was claimed under another one of the seventeen policies referred to in the opinion in that case. This
case was submitted to the court for trial without a jury and
was tried by the same judge sho presided at the trial in the
former case. For the reasons stated in that opinion, the
judgment of the Municipal Court will be reversed and the cause
remanded.

REVERSED AND REMARDED.

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MATTIE J. BROWN, Appellant,

VS.

EDWARD N. BROWN, Appellee.

APPEAL PROM

cincur count

COOK COUNTY

186 I.A. 88

MR. PHESIDIMO JUSTICE PITON ARREQUICED THE DECISION OF THE COURT.

this is a section by appollant to transfer this appoal to the supreme court, upon the ground that a freehold to involved. It appears from the transcript that appollant filed her bill in the direult fourt of Cook Jounty, praying for a diverce on the grounds of crusty and adultary. It is also alloged in the bill that after her carriage to appollee, appellunt bought with her own money certain described real outste: that it was understood and agreed at that time that the conveyance should be made to appullant alone, but that, without her knowledge and consent, appelle wrongfully, secretly and surrentitiously, "and for the purpose of appropriating to himself a right and interest in said real estate to which he was not optitled", caused the agent of the vendor to insert in the deed of conveyance the name of appelles as a grantee jointly with appullant, and a warrant, dood was executed in that manner, and recorded before appellant was aware of that fact: that and had no knowledge that such was the fact until the dead was returned to her from the recorder's office: that thereupon also demanded that appelles release and convey to her his apparent interest in such real estate, but that appelles refused to do so and his ever since continued to hold the same wronefully and Illegally. To these allegations say appended a prayer for a decree requiring appelled to release and convey all interest in



dervice the charges of cruelty and adultery and the charge of fraud as to the real estate, but adultery and the charge of fraud as to the real estate, but adultery and the charge estate was purchased with appellant's own money. Upon the hearing before the chancellor, evidence was introduced by appellant tending to prove the averments of her bill of complaint. The direct court held the proof insufficient, discissed the bill for want of equity, and the complainant perfected an appeal to this court. Here, the appellant has assigned as errors the action of the direct court in refusing appellant a decree of divorce and also in refusing to require appellant a decree and convey to appellant all interest in the real estate described in the bill of complaint.

in lowerby w. Modemb, 230 Ill. 586, it was held that this court has no jurisdistion to hear and determine an appeal in a divorce case, if it appears that a freshold is directly invelved. In that case a decree of diverce was entered, which also directed one of the parties to convey certain real estate to the other. It is urged by appelled's counsel that under section 17 of the Divorce act (Nev. Stat. Ill., Chap. 40), such a decree can only be entered in a diverce proceeding when a diverce is granted; and it is pointed out that in this case, no divorce was granted; hence, it is said, no freshold is necessarily involved. The jurisdiction of the Circuit Court to hear and deternine the issue raised as to the title to the real estate in queetion, does not depend on the Divorce act. The plendings in this case present two distinct issues, one whether app liant is ontitled to a divorce, and the other, whether she is entitled to a decree for a reconveyance of the real outate. To desurrer was filed by appelled. The issues were joined and the parties went to trial upon both issues. In one of such issues, a freehold was directly involved, and the decree dispersed of both.



For this reason, a freehold is necessarily involved.

arpeal to this court and assigning errors which this court has jurisdiction to determine, appellant has saived or abandoned all questions relating to the freshold. Buch is undoubtedly the rule which obtains after the case has been argued and submitted for decision to this court. Poe v. Ulrey, 253 711. Ma, 31; Jennett v. Tillard, 270 Ill. 330; Jown of Boott v. Artman, 227 Ill. 400; Houren v. G.H.&it.7. Ry. Co., 238 Ill. 520, 328; Ellers Fire Ins. Co. v. People, 170 Ill. 474; Case v. City of ullivan, 22 Ill. 50, 32. In this case, however, appellant has made his notion before any briefs or abstracts have been filed in this court. We are of the opinion that, under these circumstances, section 102 of the Practice Act makes it our duty to transfer the cause to the Supreme Court; and it will be so ordered.

TRANSFERRED TO SUPREME COURT.

- (1000) 4211 100 the second secon SAMUEL MARKS and JACOB H. MARKS, doing business as H. MARKS' SONS,

Defendants in error,

VS.

INE WILLIAMS and RUBY WIL-LIAMS, doing business as J. WILLIAMS' SONS,

Plaintiffs in Error.

ERROR Y

RUNICIPAL COURT

OF CHICAGO.

186 I.A. 90

AND. JUNTICE ORIGINAL DELIVERED THE OPINION OF THE COURT.

plaintiffs in error by this writ seek to reverse a judgment remiered against them for 1834 in the unicipal Court of Chicago in an action of the fourth class tried by the court without a jury. The claim of the plaintiffs in the trial court was for damages for the alleged wrongful conversion by the defendants of 18 tens of scrap iron of the value of 18.85 per ton.

After the transcript of the reserd was file! in this sourt the defendants in error entered their appearance and filed a written motion to strike from the record the "alleged bill of exceptions" and to affirm the judgment, which notion who denied. They have not, however, seenfit to file any brief or argument in answer to the points here raised by counsel for plaintiffs in error.

on the trial in the Sunicipal Court only three witnesses testified, - the plaintiff, Jacob H. Marks, and both defendants, and certain writings were admitted in evidence. It appears that the plaintiffs were dealers in scrap material in the City of Chicago: that on July 6, 1911, they obtained permission from the Baltimere and Chic Chicago Terminal Company (hereinefter referred to as the Company) "to unload a wagen load of steel girders" on the vacant property of the Company at Center avenue and 18th street in said city, plaintiffs informing the Company at the

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time that they intended in "about 10 days" to ship said irders over its road; that said girders were there unloaded and at that time, according to the testimony of Jacob H. Warks, weighed 10 tons and were of the value of 110.35 per ten; that suid girders sere not thereafter moved by plaintiffs at any time and were not thereafter seen by Jacob H. Warks, except on one occasion about a wonth after they had been deposited on the property of the Company; that on March 19, 1912, the Division ingineer of the Company wrote defendants, Ale were also dealers in scrap material in Chicago, that there was a considerable mantity of "scrap" on the property of the Company at said location which the Company desired to sell to the highest bidder. and requested that defendants make a bid for the material: that defendants inspected the material, which they found consisted of steel girders, and offered the Company the sum of 350 therefor: that on April 3, 1912, the Company sold the girders to the defordants receiving from them the sum of \$50; that the defendants thereafter had said girders broken up into small pieces while on the property of the Company in order that the same "right more easily be carried away"; that on "ay 6, 1912, the defendants connected to carry away said broken material from the provises and convey the same to the defendants' previees; that two wagen loads were so conveyed; that when the third wagon load was so being conveyed Jacob M. Larks happened to set the contents of said wagon and immediately notified defendants that said material belonged to plaintiffs; that this was the first intimation that defendants received that plaintiffs claimed ownership of the material so purchased by the defendants from the Company, and that defendants retained possession of said material and refused to pay plaintiffs any sum whatsoever therefor.

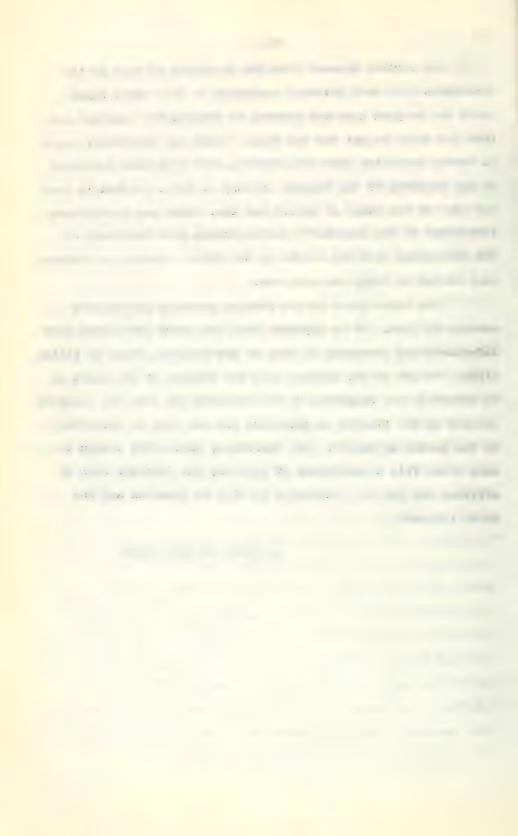
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It further appears from the testimony of both of the defendants that said material contained in said three wagon loads was weighed upon its arrival at defendants' premises and that the total weight was six tons. While the plaintiff, Jacob I. Marks, testified that the girders, when they were deposited on the property of the Company on July I, 1911, weighed 15 tons and here of the value of \$10.25 per ton, there was no evidence introduced by the plaintiff's contradicting said testimony of the defendants that the weight of the broken girders, so carried away on May 8, 1912, was six tons.

the trial court in his finding assessed plaintiff's damages at \$1.54. It is apparent that the court considered that defendants had converted 10 tons of the material owned by plaintiffs. We are of the opinion that the finding of the court as to amount is not supported by the evidence and that the judgment entered on the finding is excessive and can only be sustained to the amount of \$31.50. If, therefore, plaintiffs within ten days shall file a rewittitur of \$102.50, the judgment will be affirmed for \$51.50; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.



ch Term, 1913, 10.

JOSEPH UNGAR, Defendant in Error,

ERROR TO

VB.

MUNICIPAL COURT

E. F. SFYDACKER, Plaintiff in Error.

186 I.A. 91

MR. JUSTISE GRIDLEY DELIVERED THE OPINION OF THE COURT.

the trial court, seeks to reverse a judgment for 18% rendered in favor of Jeseph Ungar in the Municipal Jourt of Chicago upon the verdict of a jury.

About June 19, 1911, plaintiff was employed by defendant to make certain alterations on the latter's house at Wenilworth, Illinois. According to plaintiff's version to was to be paid at the rate of 14 per day for every day that he worked on the job. He says he was paid up to and including July Mind. but that for the days he worked subsequent to that time, and up to Augu t 15th, "e was not paid. His claim was for labor performed for 20 1/2 days at & per day, amounting to 192, and also for the sum of [2.6] for certain mosquito netting purchase; for defendant at the latter's request. According to the defendant, it wa: vorbally agreed between the parties that plaintiff was to perform the labor required for making said alterations, that for this labor of plaintiff and an assistant the defendant was to pay e sum not exceeding \$40 per week, that the defendant was also to pay for all materials, that the maximum sum to be paid by defendant for all pecessary labor and materials was \$750, and that plaintiff was to receive any difference between said 1770 and the total execut paid by defendant for said labor and materials. The defendant filed a set-off claiming that said alterations actually so t him the rum of 1980.78 and that plaintiff was indebted to bin in the sum of 3818.78. Plaintiff denied that he ever mede

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any agreement to complete the alterations for 1750 or any other fixed sum.

The only point here made in the brief of counsel for defendant is that the verdict is against the manifest weight of the evidence. We have carefully examined the testimony of the several situations and the exhibits. We do not thin's any useful purpose will be served in discussing the evidence, which we find conflicting. We does it sufficient to say that, in our epinion, the vertical is not manifestly against the weight of the evidence. Accordingly, the judgment of the municipal Court will be affirmed.

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ierm, 1913, No.

J. LEVIT,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

186 I.A. 104

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 13, 1912, a judgment by confession for \$135 for commissions and 25 attorney's fees, or for the total sum of 1100 and costs of suit, was entered in the "unicipal lourt of Chicago against J. Levit, defendant, and in favor of smil a. Oettinger, plaintiff. The warrant of attorney, signed by the defendent, appeared on the same sheet of paper immediately below an application for a real estate loan, also signed by the defendant. The application was dated June 1, 1912, and was addressed to "Citizen's Realty : Investment Co.. (Unincerporated)" under which trade name the plaintiff then did a real estate and brokerage business in the City of Chicago. my said application the plaintiff was authorized by defendant, inter alia, to negotiate and procure for defendant a loan of 4500 on certain property of the defendant situated in Chicago, and defendant agreed to pay all charges and expenses for the examination of the abstract of title, for recording all papers, for perfecting the title, or for any other purpose incident to the making of the loan; and defendant further agreed to pay plaintiff a commission of 5 per cent. on the amount of said loan, (viz: |175) "when the said loan is accepted."

Subsequent to the entry of the judgment, on actober 3, 1910, the defendant appeared and moved the court to vasate the judgment, supporting the motion by an affidavit algord by himself. The motion was denied.

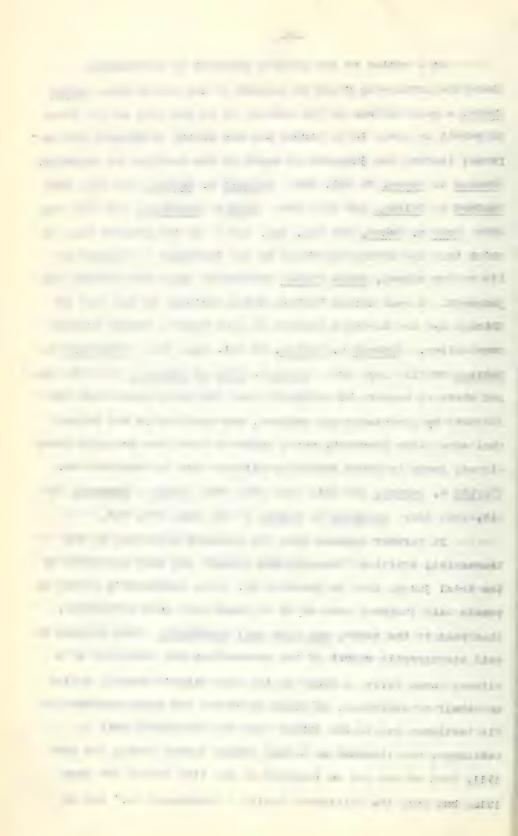
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On October 24, 1912, the defendant made a second notion to vacate said judgment, supporting this motion by the affidavits of himself and of one of his attorneys. The affidavit of sain attorney was to the effect that while plaintiff had procured a license from the city of Chicago as a real estate broker for the year expiring December 31, 1911, he had no such licen e on June 1, 1912, or at any time during the year 1912. the defendant's affidavit was to the effect that he had no knowledge or any reason to believe that said judgment of July 13. 1912. had been entered against him until he was so informed on October 1, 1918, when he employed an attorney, otc.; that he had no knowledge of ever having signed any warrant of attorney to confess any judgment in favor of plaintiff and that if his signature was subscribed to such an instrument it was so subscribed on the representation of plaintiff that said instrument was an application for a loan and nothing more; that while he read the application for said loan before signing it, he is not well versed in the English language, particularly with legal documents; he signed said instrument on the representations of plaintiff that the same was merely an application for a loan and that he relied upon those representations; that said loan was never made nor was a tender of the loan ever made to defendant by plaintiff; that at the time defendant signed said application, on June 1, 10 to rlaintiff, at defendant's request, signed and delivered to defendant a writing as follows: "It is hereby understood that if by the 18th of Sune, 1912, we decide not to accept your loan .e will on request return to you or cancel your application received this day;" and that defendant was not notified that any 1: In would be produced through plaintiff within 15 days of the making of said application.

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On a motion to set aside a judgment by confession, where the affidavits filed in support of the otion show, prima facie, a good defense on the merits, it is the duty of the court to permit an issue to be formed and the debter to present his de ferme, leaving the judgment to stand in the meantime as security. (dondon v. Sesse, 88 Ill. 159; Farwell v. Suston, 151 Ill. 239: umford v. Tolmar, 157 Ill. 288; Nees v. Dumbauld, 148 Ill. app. 497: Hood v. Jehrs, 170 111. App. 330.) In the present case we think that the affidavits filed by the defendant in support of his motion showed, prima facis, sufficient cause for opening the judgment. A real estate broker, doing business in the City of Chicage and not having a license as such broker, cannot recover commissions. (Rokert v. Collot, 48 Ill. App. 341; Thitfield v. Huling, SO Ill. App. 179: Braun v. City of Uhicago, 110 Ill. 186.) And where it appears by affidavit that the note, upon which the judgment by confession was entered, was executed in the belief that some other document, not a judgment note, was actually being signed, leave to plead should be allowed upon due application. (Murphy v. Schoch, 135 Ill. pp. 550, 552; Funk v. Hossack, 115 111. App. 340; Anderson v. Field, 8 111. App. 307, 310.)

It further appears from the document contained in the transcript, entitled "Stenographic Report" and duly certified by the trial judge, that on November 25, 1915, defendant's mution to vacate wai: judgment came on to be heard upon said affidavits, then read to the court, and upon oral testimony. Then follows in said stenographic report of the proceedings the testimony of a vitness named Kelly, a clerk in the city clerk's office, called on tehalf of defendant, as given on direct and cross-examination. His testimony was to the effect that the plaintiff, Emil A. Cettinger, was licensed as a real estate broker during the year 1912, that he was not so licensed at any time during the year 1912, but that the "Citizens' Realty a investment 60." was so



licensed for said year, 1913. Then follows the testimony of the plaintiff, called as a witness on his own behalf, as given on direct and cross-examination. His testimony was to the effect that he did business in the year 1012 as a real entate broker under the trade rame of "Citizens' Realty & Investment Co., (inincorporated)"; that for the year 1919 he had a ligense to do business as a real estate propur under said trade name: that no one but himself did business or attempted to do business as a real estate broker during said year under said license; that his license for the year 1011 was in his individual name; that he applied and paid for a renewal of that license for the year 1912; that the city returned to him a license for said year but under said trade name instead of under his individual name: that shortly after the receipt of said license he called at the office of the city clark and requested that said license be issued in his individual name, as formerly, but that he was there informed by one of the deputy clarks that under the circumstances it was unnecessary to make any change in the license and that "I lot it go at that, because it is the same thing anyway." It aces not appear that the defendant, at the time plaintiff was called as a witness to testify or at any time during his examination, objected to his counter-testi cony on the ground that the sale was improper upon the hearing of a motion to vacate said juin ent, or that if said motion was granted the deferdant desired a trial of the issues by a jury, or made any objection whatsoever to plaintiff testifying as a witness.

It further appears from said stenographic report that at the conclusion of plaintiff's said testimony the further hearing was postponed until December 7, 1912, on which date the trial was resumed, both parties being present with their attorneys; that a stress named Rolm testified on behalf of plaintiff and was cross-examined; that plaintiff further testified on his own

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It is first contended by counsel for defendant that the trial court erred in permitting the introduction of the counterevidence of the plaintiff, as to the merits, on the hearing of a metion to vacate the judgment. On the hearing of such a motion, where the motion is supported by affidavits of the defendant. the rule is that it is improper for the court to consider, over objection, counter-affidevits controverting the defense to the judgment on the merits. (Gilchrist Co. v. Northern Grain Co., 204 Ill. 510; Mendell v. Kimball, 86 Ill. 582; Hood v. Gehrs, 170 III. App. 230.) The reason for the rule is that, if the affidavits show prima facie a meritorious defense to the judgwent, the defendant is entitled to have the issue passed upon by a jury. (Filehrist Co. v. Northern Grain Co., supra; Hood v. Gehra, supra.) And where the motion is supported by evidence heard in open court instead of by affidavits, the rule also is that it is improper for the court, over objection, to hear counterevidence. (Sirtman Co. v. Thompson, 130 Ill. App. 621, 827: Todor ick v. Leomia, 168 111. App. 214, 217.) But, in our opinion, where as here it appears that, on a notion made in the "unicipal yourt in a fourth class case to vacate a judgment by confession, sounter-syldence to the case made by the defendant is heard by the court, without any objection whatseever being made by the defendant to such action, and the hearing is in fact treated by both parties as if a formal order had been entered by the court opening up the judgment, and a full hearing or the merits is

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actually had, the fact that the trial court failed to enter a formal order opening the judgment, and at the conclusion of said hearing ordered that defendant's motion to vacate said judgment be denied, does not warrant this court in reversing said last mentioned order and remanding the cause for a trial on the merits. Such a trial has already been had, participated in by the defendant without objection, and the merits of his case fully considered by the court and decided adversely to him.

As to the question whether or not, under all the evidonec, the judgment entered against the defendant should stand. no point is here made by counsel for defendant that the warrant to any attorney of any court of record to confess the judgment was not actually signed by the defendant, or that the attorney .inc confessed the judgment did not have apparent authority so to do, or that the amount for which the judgment was entered, ircluding the attorney's foes, was too large. The only points raised on the merits in the trial court, and here raised, are (a) that plaint ff was not a licensed real estate broker and Therefore could not recever any sum from defendant as commissions for negotiating the loam applied for, (b) that defendant's signature to said warrant of attorney was obtained by the fraudulent representations of the plaintiff, upon which the defendant relied, and (c) that the said loan applied for was never made nor was a tender of the same made to the defer ant by plaintiff within the proper time.

As to the first of these contentions we think the evidsnce sufficiently shows that at the time the application was signed, and during the entire year of 1912, the plaintiff was a licensed real estate broker. It is true the license for said year was issued in the name of the "Citizens' Realty & Investment do. (Unincorporated)", the trade name under which plaintiff did business, but it also appears that plaintiff himself paid for that

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license, that no one but himself did business under it, and that he endeavored, shortly after it was received by him from the city, to have the same issued in his individual name but that his request was refused.

And, in our opinion, the evidence was not sufficient to warrant the court in holding that the signature of the defendant to said warrant of attorney was obtained by the fraudulent representations of the plaintiff which were relied upon by the defendant, or that the defendant, when he signed the application and the agreement to pay commissione, in which was contained said warrant of attorney, was not sufficiently versed in the english language to understand the meaning of the papers, which he testified he read over before signing.

about the time the application for said loan was signed the plaintiff requested the Home Bank . Trust Company to make said lean to defendant; that said company after examination of the abstract and of the property agreed to make said lean and so matified plaintiff and was at all times after, to-wit: June 12, 1912, ready and willing and able to make said loan to defendant: that about June 19th plaintiff advised defendant that the loan had been accepted and requested defendant to call and sign the mecessary papers: that defendant called on plaintiff about June 20th and refused to take the loan, and refused to sign the papers which had already been drafted, and that subsequently defendant accepted a loan on the same property from another party.

cur conclusion is that under the facts of this case the trial court did not err in entering the order overruling defendant's motio to vacate said judgment, and the order will, accordingly, be affirmed.

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arch Term, 1915, in. 133 - 19199.

> AMANDA JONES, Appellee,

APPEAL PROM

VS.

CIRCUIT COURT

ANION JONES, Appellant. COOK COUNTY.

186 I.A. 106

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 5, 1911, Amarda Jones, complainant, filed her bill of complaint in the direct Court of Cook County against her husband, anton Jones, defendant, a resident of the city of Chicago, alleging in substance that on June 3, 1986, she was lawfully married to the defendant and continued to schabit with him as his wife until January 25, 1905, when the left him without fault on her part and refused longer to live with him: that she was compelled to leave him because of his cruel and inhuman treatment of her, his habitual drunkenness, and his adultery, and because of his having communicated to her a venercal disease, from the effects of which she has ever since suffered; and that the child of said marriage. Florence Jones, now about thirteen years of age, is in her care and custody. The bill prayed for suparate maintenance, the custody of sald shild, alimony and solicitor's fees. The defendant filed an answer, in which he admitted said marriage and cobabitation, but deried the other material allegations of the bill, and further deried that complainant was a proper person to have the care and quatedy of said child. The defendant also filed a cross-bill in which he alleged, inter alia, that on said Janusry 15, 10", the complainant wilfully deserted him without any just cause and still persists in such desertion, and prayed for an absolute divorce and the custory of said child. The complainant answered said cross-bill, and both bills were put at issue, and a full hearing on both bills was had in open court

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before the charcellor, without a jury, and on votober 7, 1:12, the court entered a decree for separate maintenance in favor of complainant, in which it was provided that she should have the care and oustody of said child, that the defendant should pay for her support and the support of said child the sum of 10 per week, and also the sum of 50 for solicitor's fees, and that the defendant be restrained from visiting complainant's home and from interfering with her affairs or with sail child, and from selling, assigning or incumbering his property, etc.

The defendant by this appeal seeks to reverse the decree.

It is contended by counsel for defendant that the degree is contrary to the evidence. We have carefully read all of the evidence heard by the chancellor in open court, at contained in the certificate of evidence signed and scaled by the judge. while the testimony of the complainant is flatly contradicted by that of the defendant on material points, we think that her testimony, taken in connection with the other testimony introduced in her behalf, sufficiently sustain the allegations of her bill, and that the findings and decree of the chanceller are not manifestly against the weight of the evidence. The chancellor had the opportunity of seeing the several witnesses, hearing them testify and observing their marmer while upon the witness stand. And the finding of a chancellor in a suit for separate maintenance, where the witnesses have been examined orally in open court, will not be disturbed on appeal unless the evidence clearly preporderates against it. (Porter v. Porter, 181 Ill. 398, 400; Johnson v. Johnson, 125 Ill. 510, 514: Schriner v. Schriner, 1 5 Ill. App. 191, 193.)

And we do not think that under the facts of this case the court erred in allowing the sum of \$50 for solicitor's fees, as contended by counsel. Neither 40 se think that the court, in

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admitting in evidence the affidevit of Doctor Matthei over the objection of counsel for defendant, committed such an error as warrants a reversal of this case.

The decree of the Circuit Court is affirmed.

AFFIRMED.



iarch Term, 1913, No. 182 - 19185.

> PERDINAND C. NIEMEYER, Defendant in Error,

> > VB.

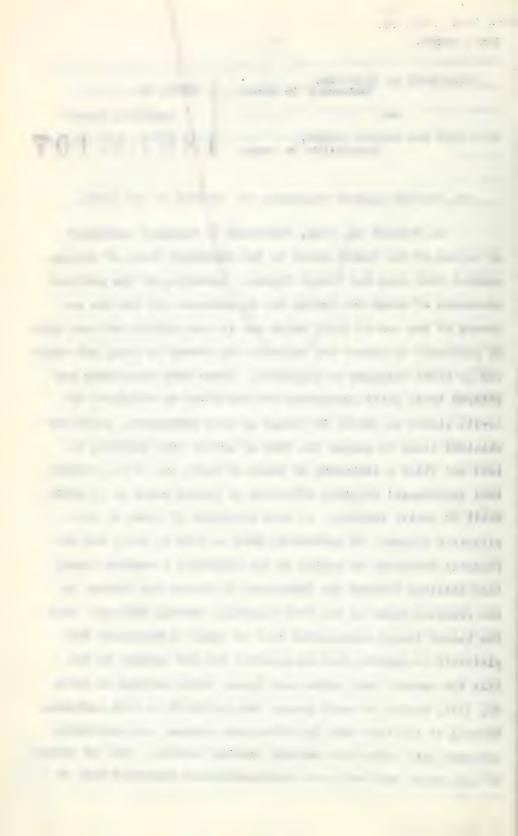
GUST BERG and JOSEPH BRASEC, Plaintiffs in Error. BIRON TO

MUNICIPAL COURT

6 I.A. 1107

THE JUSTICE GRIDLEY DELIVERED THE SPINIOR OF THE SOURT.

on January 18, 1913, Ferdinand of Hieroger commonded an action of the fourth class in the Tunicipal Court of Chicago against Tust Borg and Joseph Brabes. According to the original statement of claim the action was in contract and for the recovery of the sum of \$150, which man it was claimed had been paid by plaintiff to Brabec and delivered by Brabec to derg, and which sum of right belonged to plaintiff. After both defendants had entered their joint appearance and hai filed an affidavit of merits signed by Brabec in behalf of both defendants, mlaintiff obtained leave to change the form of action from contract to tort and filed a statement of claim in tort, and it was ordered that defendants' original affidavit of merits stand as an affidavit of marits thereto. In this statement of claim in tort plaintiff averrei, in substance, that on June 4, 1912, the defordants protended to assign to the plaintiff a certain lease, then existing between the defendants as lessor and losses, of the premises known as No. 2789 . heffield avenue, Chicago: that the lesser (Herr) represented that it would be necessary for plaintiff to deposit 1100 as security for the payment of the last two months' rent under said lease, which expired on April 30, 1918, before he would accept the plaintiff as such assignee, knowing at the time that the defendant, crabec, had providualy assigned said I ase to a certain trewing Company: that or rooms of said false and fraudulent representations plainties poid to



the defendant, brabes, said sum of 100 as security for said last two months' rent, and that said lease had not been and never was assigned to the plaintiff; that on deteber 26, 1912, plaintiff was dispossessed of the premises; that at said time he was not indebted to said defendant just berg, and that since his said dispossession the wife of the defendant, Trabes, has been in the possession of said premises.

that the same was tried before the sourt without a jury, and that on Japanery 30, 1915, the court found "the definiant guilty in manner and form as obarged in plaintiff's statement of claim", and that on the same day the court adjudged that the plaintiff "have judgment on the finding herein and that the plaintiff have and recover of and from the defendant the damages of the plaintiff assumpting to the sum of 150 in form as aforesaid assessed, together with the costs by the plaintiff herein expended, and that execution issue therefor." It nowhere appears that at any time the cause was dismissed as to either one of the defendants.

From the stemographic report of the proceedings at the trial, signed by the trial judge and contained in the transcript, it appears that plaintiff was the only witness in his behalf and that while he was on the stand four written instruments were identified by him and introduced in evidence; that at the conclusion of plaintiff's case counsel for defendants moved the court to find the issues for the defendants, which motion was denied; and that thereupon each of the defendants testified and were cross-examined at length.

after careful consideration we have reached the conclusion that the judgment must be reversed and the cause remanded for another trial, and, therefore, we refrain from a discussion of the evidence.



The gist of the plaintiff's claim, as disclosed by his second statement of claim, was that because of false and fraudulent representations plaintiff was induced to part with the sum of 1150, for which he never received any consideration and which sum had not been repaid to him, by reason of which he was damaged. Even in an action of the fourth class in the Municipal Court a party is limited in his evidence to his claim us made, or as amended. In this case no amendment to plaintiff's original claim in tort was at any time made. In Walter Cabinet do. v. Russell, 200 Ill. 416, 420, it is said: "The object of rules requiring statements of claim and of set-off is to inform the parties of the nature of the respective claims, and while the formalities of pleading have been abolished by statute, it is still the law in the municipal Court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim and the evidence must be limited by that statement. The issue cannot be enlarged by oral claims or affidavita filed in the case." Under the avidence in this case, in our opinion, no sufficient proof was mude by plaintiff of false and fraudulent representations made to him by eith r of the defendants such as would warrant a finding and judgment against sither defendant.

and the julgment cannot stand for another reason. The action was in tort against the defendants. One might be found quilty and the other not guilty. The court found "the defendant guilty in manner and form as charged in plaintiff's statement of claim." And the court entered judgment against the "defendant" for the sum of 150 and costs. It is uncertain which one of the two defendants was found guilty and against which one the judgment was rendered. There are two defendants, and the verment was rendered. There there are two defendants, and the verment

Symmetric Company THE RESERVE AND ADDRESS OF THE PERSON NAMED IN COLUMN TWO IN COLUMN TO ADDRESS OF THE PERSON NAMED IN COLUMN TO ADDRESS the second secon the same of the latest terms of the latest ter part . As 1 The second secon Lažu

diet as recorded is against "the defuniant", without naming him. auch verdict "in clearly insufficient to support a judgment areingt ooth, and as it fails to show which of the defendants was convicted and which acquitted, it is equally insufficient ts support a judgment against either." (Lambert v. .crden, 16 111. App. 646, 650; Woolf v. Deahl, 153 111. App. 307, 300.) No reason is perceived why the same rule should not be applied where, in an action in tort against two defendants tried by the court without a jury, the finding of the court as recorded is against "the defendant", without naming him. We think the present case is to be distinguished from the cases of Bacon v. Schopflin, 196 Ill. 122, 152; West Chicago Street R. Co. v. Morne, 197 Ill. 250, and Anefel v. Daly, 91 Ill. App. 321, 334. in Dacon v. Johopflin, supra, it is said (v. 188): "There are cases, where a verdict, returned for the 'defendant', instead of the 'defendants', has been held to be defective: but these cases proceed upor the ground that the defendants are severally. as sell as jointly, liable, and, therefore, by the terms of the regiot, it would be uncertain which one was found to be guilty."

The judgment of the Tunicipal Sourt is reversed and the cause remarked.

REVERSED AND REMANDED.

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HOMAND R. Haus. Plaintiff in Error,

yo.

HUSERT A. STACY, Defendant in Error. 31.1 (1)

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE SRIDLEY DELLEVERED THE OPERIOR OF THE GODRA 109

on August 19, 1912, Howard H. Wagg, plaintiff, commenced an action of the fourth class in the Municipal Fourt of Chicago against Hobert A. Stacy and Hrs. Tohert A. Stacy, his sife, defendants, to recover the amount claimed to be due on two promissory notes, a copy of one of which notes is as follows:

"\$300. Ohicago, June 8, 1998.
On or before Oct. 18, 1898, after date we promise to pay to the order of Howard R. Wagg three Hundred dellars, at Chicago. Value received with interest at ? per cent. per annum.

G. P. Stacy,
Hebert A. Stacy,
Frances H. Stacy."

The other note was for the same amount, of the same date, similarly signed, and was also payable to the order of plaintiff "on or before es. 15, 1800." On the back of each note appeared the following: "August 21, 1800. Received on the within note Iwanty-five Dollars (\$25)". The defense of Fre. Itasy was that she was not a co-maker of either of the notes and during the trial the suit was discussed as to her. Itasy as disclosed from his affidavit of merits, that the cause of action was barred by the statute of limitations' (sec. 15, Chap. 83, Hurd's Stat. Ill.) It was contended by plaintiff on the trial that the evidence showed that on August 21, 1902, the sum of 400 was paid on the two notes to plaintiff by ... P. stacy, a co-maker with the defendant sobert A. stacy,



that said payment "was subsequently acquiesced in and ratified by said defendant", and that, therefore, said payment otopped the running of the statute and started it running anew as ef said date at to said defendant, thus giving the plaintiff the right to commence and maintain an action against said defendant for the everque balance at any time before August 11, 1918. The case was tried before the court eithout a jury, and the court round the issues against the plaintiff and entered judgment against him for costs. Plaintiff by this writ of error seems to reverse the judgment.

It appears from the testimony of Hobert A. Stacy, in substance, that he has resided in the city of Chicago since 1880; that his father, said O. P. Stacy, died in July, 1803; that he did not authorize any one to make a payment on said notes and has to knowledge of such a payment having been made on said notes on august 11, 1802, as claimed; that plaintiff never at any time asked him to pay either of said notes; and that in the year 1808 he received a communication from a representative of plaintiff, which was the first intimation he had that anybody wanted him to pay said notes.

on august 31, 1003, "fifty dollars was paid so on the two notes" by said 3. 7. Stacy; that the endorsements on each note sued on were made by plaintiff in his own hardwriting; that subsequently in the early spring of 1000 he (plaintiff) had a talk with mobert A. Stacy on a train on route from sattle Green, "inhigan, to spicaro; that only Stacy and himself were present at that convergation; that "I told Stacy that his father, 3. 7. Itacy, had paid me .30 on the notes, and he said he was glad to hear it, and he hoped he (the father) would pay all of it, and he trought that he (the father) would pay all of it now, as he (the father) was better situated than he had been"; that this was

about all that was said in repart to the notes; and that he (plaintiff) did not at that the esk Mobert A. Itacy to pay re anything on the notes. The defendant, in surpluttal testified, in substance, that while he recalled having a general conversation on the train with plaintiff, he did not recall any such conversation a stated by plaintiff, and that "I don't re-ember of discussing the note and the payment with Mr. Wagg."

tained in the transcript before us, as cannot say that the firding of the trial court is contrary to the evidence or that the judgment is contrary to the law, as here contented by counsel for plaintiff. (Sallenbach v. Dickinson, 100 III. 487: Lowery v. 1821; 188; Davis v. Mann. 43 III. App. 201; Schinson v. Brisces, 65 III. App. 131; Lash v. Bozarth, 76 III. App. 196.) Counsel cite the cases of Granville v. Yeung, 86 III. App. 197; McDonald v. Neidmer, 103 III. App. 300, and Adams v. Douglas, 186 III. App. 210, but in each of those cases, as we read them, the facts appear to be different from the facts as disclosed in the present record.

The judgment of the Municipal Court is affirmed.

arrive J.



811 - 18982. 18982

JOSEPH STUDER, Appellee,

THE.

CHICAGO, LAKE SMORE & SOUTH BENG HAILWAY COMPANY, Appellant. APPEAL PROM

CIRCUIT COURT

COOK COUNTY.

186 I.A. 110

STATEMENT OF THE CADE. This/is an appeal by the appellant (hereinafter called the defendant), Chicago, Lake Shore . South ford hailmay Sompany, from a judgment rendered against it in favor of the appelled (herein fter called the plaintiff), Tosoph Studer, for 15,000, in the Sircuit Court of Cook County, in an action on the cast. The declaration as originally filed mentalized two counts, but the second count was dismissed before the trial of the case. The remaining count charged in substance that, on ctober .. 7, 1010, the defordant operated and controlled a certain line of railroad running in a northerly and scutherly treetlon, through the term of Indiana Harbor, Indiana, and upon we along a certain street or public thoroughfare in said town lucion as Juolid Avenue: that the defendant cored, operated and managed certain electric cars upon and along said rallroad: that It was the duty of the defendant to use all proper care not to injure persons or property in the lawful use of the street or high-ay along which said cars were operated: that it was the duty of the defendant to approach intersections and crossings sith their said cars under control, so as to be able to avoid injuring persons lawfully using sald streets over which said sare run; that it was the duty of the defendant, hefore approaching said crossings or intersections, to give signals of the approach of oul! cars, so that per one on the street or highway would have notice of the approach of said care; that on the date last mentioned, the plaintiff was the omor of two certain horse, to-



nother with a two horse wagon, said wagen being loaded with meat, all of the value of 1750; that on the last mentioned date, the plaintiff was driving 'do said horse and waren along 139th Street, and at a point where sare intersects with Englid Avenue, in the town of Indiana Carbor, Indiana, and while in the exercise of all due cars and caution for his our safety and for the safety of his said horses and sagon, and just before reaching said intersection, he stopped his said team, looked in both directions and listened, but saw nor heard no car or care coming in sither direction, as there was no varning or signal given of the approach of any car and seeing nor hearing no car. and while still looking and listering, plaintiff proceeded to drive across said Muclid Avenue, upon which avenue said railroad runs at arade: that before he could get across said tracks on said Enclid Avenue, one of the defendant's cars, being in the control and management of defendant's servants, was so carelessly, negligently and unskillfully operated and managed, and was running then and there at a high, dangerous and unlawful rate of speed, and giving no warring of its approach to said intersection. rar into, against and collided with plaintiff's said wagon with great force and violence, breaking said wagon and injuring one of the said borses, throwing plaintiff to and upon the ground. greatly to the injury of the plaintiff, in that his right foot was badly crushed and its left foot was severed, and he was greatly hurt and bruised about the body and made lame, sick, etc .: that as a result of said accident, he has been greatly and pormanently injured and will be deprived of a large sum of noney stich be could have earned had be not been injured as aforesaid; that his ability to earn money has been "restly impaired if not tetally destroyed: that he has suffered great and excruciating pain, and that he has been damaged to the extent of 30,000.

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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant has argued at great length, two propositions: (a) that the finding of the jury that the plaintiff was not suilty of contributory negligence is manifestly against the weight of the swidence: (b) that the verdict of the jury is manifestly against the weight of the evidence. These two propositions can be considered together. The theory of the defendant. as to the evidence, was that the defendant's motorman was propelling hie car northward in and along Suclid Avenue and that the plaintiff was driving his team along the same street and in the same direction; that the car was then going at the rate of from fifteen to twenty miles an hour; that the motorman sounded his whistle before he reached 140th Street, the etreet just south of 139th Street, the place of the accident; that at the same time he sounded the whistle he turned off the power on his car, so that he might be able to stop the car, in case the plaintiff drove his team across the railroad track at 139th street: that he kept the power off until he saw the plaintiff go beyond the point at 139th .treet where teams ordinarily turned to cross the rallroad track at that street; that assuming from this conduct of the plaintiff that he was not going to cross the railroad track at 139th . treet, the motorman again put on his power, and that just thereafter the plaintiff, without looking to see if a car was coming, suddenly turned his team to the right and upon the railroad track: that the moment the moternum saw the plaintiff do this he "three the air in emergency" and did all he could to step the car: that repeated blasts of the whistle were blown before the car reached 140th Street and between 140th Street and 130th Street. The theory of the plaintiff, as to the evilence, was that he was driving north on Suclid Avenue, towards 136th Street, in a large wagon heavily loaded with meat; that it was



a sold, windy day; that the sind was from the southwest and it was blowing dense smoke that issued from a steam roller standing at 147th Otreet and audil avenue across the railroad track at that point: that as he approached 170th street he steed up and looked in both directions to see if there was a car desing; that he sould see along the railroad track as for south as 140th Lirect, but no further, or account of the dense smoke from the stear relier at that place; that as far as he could see to the south, there was no car coming; that as he reached the south line of 193th Street he made a big, wide turn before approaching the trucks; that from the place of the turn to the truck was 18 or 18 feet; that the tracks were four or five inches above the level of wolld Avenue, and that there was no grade up to the track to drive on, and that he had to hold a tight rein on his horses and pay close attention to them in driving up to and over the track or he would have "gotten stuck with his team": that arter be rade the turn and before he reached the reflect track. he continued to lock ir both directions for ears; that he naw more coming; that the horses and the front part of the wages get over the railro d track, and the lind whoels of the wager were on the track when the car hit the wagon; that the force of the colliston was so great that the wagon was knowled a distance of 45 foot, and that it then struck a trolley pole with such force that it broke the pole off about two or three feet above the ground: that portions of the sagon and contents were found 100 to 400 feet away from the point of the collision; it the car ren a distance of 14 fact after the collision before it stopped; that the car gave no signal of any kind of its appreach to 170th street: that it was running at a speed of from thirty to forty alles an hour; that the motorman aid not onesk the speed of his car as it appresched the crossing in question, and that he did not have the car under control at any time as he approached 170th Street.



an extended analysis of the evidence. Noth theories, as to the manner of the accident, find support in the testimony. The jury, with far better opportunities than we to judge of the credibility of the witnesses and the weight of the evidence, by their verdict, found that the plaintiff's theory of the accident was sustained by the weight of the evidence. The able and experienced judge who presided at the trial has approved the verdict of the jury. After a careful examination of the evidence we feel assured that we cannot say that the verdict of the jury is manifestly against the weight of the evidence. It follows from this conclusion that neither of the two propositions advanced by the defendant can be sustained.

The defendant complains of the refusal of the court to give the following instructions:

"The plaintiff is presumed to have seen whatever was within the range of his vision and to have
heard whatever was within the range of his hearing,
and if you find from the evidence that the plaintiff
looked at a point or place where he could have avoided
the collision before he drave upon defendant's tracks,
and that the car was within his range of vision, then
the law presumes he saw what he might have seen; and
if you find from the evidence that the whistle on the
car was sounded in such a manner as to be within plaintiff's range of hearing, and the plaintiff listened,
then I instruct you that the law presumed that the
plaintiff heard what he might have heard."

"It is the duty of a traveler in a public street of a city on which is being operated a street rail-way, to use his senses of sight and hearing, and to observe what he sees and to heed what he hears. It is not sufficient for the plaintiff to prove that he looked, if he did not observe what was within his range of vision, or to listen if he did not heed what he heard. The law presumes that he saw what was within his range of vision, and to have heard what was within his range of bearing. Such a person who falle to hear or see what he might have heard or seen by the exercise of ordinary care, and by such failure proximately centributed to his injury, is guilty of centributory negligence, and cannot recover."

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It is not an accurate statement of the law of this State to say without qualification, that a man is presumed to have seen whatever sas in the range of his vision and to have heard shatever eas in the range of his hearing. Whether such a presumption arises depends upon circumstances. (The Chicago & N.W. A. Co. v. Dunleavy, 189 ill. 185, 180; The Migin J. & E. R. Co. v. Lawlor, ... 9 111. 321, 3.7.) The two instructions in question are also open to the further objection that they are argumentative in form. Journal for the defendant contend, however, that as the accident happened in Indiana, the law of that State must govern, and that under the las of Indiana, the two refused instructions stated correct propositions of law and should therefore have been given by the court. If the las of Indiana on the subject in question differs from the law of this State it was incumbert upon defendant to proy that fact, and the proof on this subject must appear like any other proof in the bill of exceptions. As there is no evidence in the bill of exceptions in support of the contention of counsel, we must presume that the law of Indiana applicable to the instructions in question is the same as that of this State. (Chumasero v. Hibert, 24 fil. 20%; forris v. Wibaux, 180 fill. 827; Hakes v. Ine Rational Utate Hank of Terre Haute, 184 111. 273: The Jumning System v. LaPointe, 113 Ill. App. 409.) The ccurt, therefore, properly refused the two instructions.

The court gave to the jury, at the instance of the plaintiff, a stock instruction on the question of damages, and the defendant complains that the instruction allowed the jury to award damages for an element of damages as to which there was neither pleading nor proof. We find no murit in this contention.

The judgment of the Circuit Court of Gook County will be affirmed.



ber form, 1912. Io. 517 - 18968.

ANNA SELINGRI, Appellee,

VB.

JOHN E. HOLLAND, Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

186 I.A. 112

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This was an action on the case, brought by the appellee (hereinafter called the plaintiff), Anna Selinski, against the appellant (hereinafter called the defendant),

John L. Relland, to recover damages for personal injuries alleved to have been received by the plaintiff in a cellision with defendant's automobile, or December 21st, 1908, at or near the intersection of mashington boulevard and Redzie avenue, in Chicago, Illinois. The jury returned a verdist finding the defendant guilty and assessing the plaintiff's damages at 1900: jud ment was entered or the verdict and this appeal followed.

The plaintiff did not file a brief in this case, and this fact has increased the laber of this sourt in passing upon the merits of the appeal. The defendant has assigned a number of reasons why the judgment of the Euperior Court of Cook County should be reversed. We find no merit in any of the assignments - save one. The defendant claims that the trial court errod in denying defendant's motion to ast aside the verdict of the jury. Defendant contends that the finding of the jury that the plaintiff was not quilty of contributery negligence at the time of the accident is manifestly and clearly against the weight of the circumstances, and that it was the duty of the trial judge, under the circumstances, to set aside the verdict and to grant the defendant a new trial, and that the failure of the trial court to do this is error for which the judgment must be reversed.

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if the record sustains the contention of the defendant, then, undoubtedly, under the rule armounced by our Jupress Court, the trial court erred in refusing to grant a new trial in the case. (Denelson v. East St. Louis My. Co., 235 Ill. 388.) We have, with great cars, examined the evidence, and while we are satisfied that the evidence for the plaintiff, when considered by itself, is clearly sufficient to sustain the verlict, we are none the less satisfied that when all the evidence in the case is considered tegether, the finding of the jury that the plaintiff, at the time of the accident, was in the exercise of ordinary care for her own safety is clearly and manifestly against the weight of the evidence. In passing upon the weight of the evidence, we have given full force and effect to the fact that the jury and the trial court saw and heard the witnesses and had fur better opportunities than we to pass upon the credibility of the witnesses and the weight that should be attached to their testimony.

The defendant asks that we reverse with a finding of facts, but so do not think that this is a case in which the power of the appellate Court to make a finding of facts should be exercised. We cannot say that it is clear that there can be me recovery in the case which this court would permit to stand; neith room so say that this is a case where a recovery would be recely a perversion of justice. (Sorg v. C.S.i. P. v. Co., 192 111. 305.)

For the error of the trial court in overruling the motion of the defendant for a new trial, the judgment of the Superior Court of Cook Jounty must be reversed and the cause remarded.



er Term, 1912. No.

524 - 19148.

WILLIAM L. O'CONNELL, ADAM J. KASPER, NICHOLAN INTELLY and SITY OF CHICAGO,

Defendants in Erro

vs.

CATHERINE 5. FAY, JOHN ESTEN
COOKE, Jr., ELIZABETH B. COOKE,
PAULINE M. COOKE, H. BRENT COOKE,
Jr., EALLIE W. COOKE, LYDIA W.
COURS SURLIPPE, THOMAS FAY, JOHN
ESTEN COOKE and H. BRENT COOKE,
Plaintiffs in Error.

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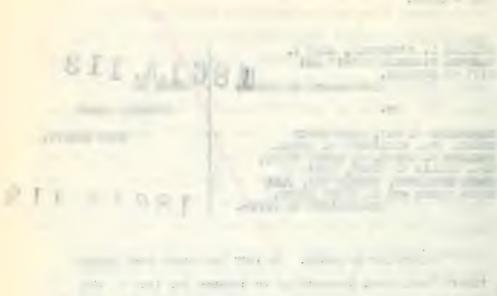
CIRCUIT COURT

COOK COUNTY.

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ioner. Instituted proceedings to condemn two lots on the cuthwest corner of Princeton avenue and orty-fifth street in the city of Chicago. The jury returned a verdict fixing the value of the two lots at \$2.2.5, and the value of the improvements on the two lots at \$2.5.5, and the value of the improvements on the two lots at \$2.50. The Park Commissioners, in 1.00, paid the total award for the lots and improvements into the hards of the County ressurer of Cook County. A dispute arose as to the ownership of the fund, and on July 5, 1.00, the County Treasurer filed a bill of interpleader in the Circuit Court of Cook County, making all the claimants of the fund parties to the proceedings. Two of the defendants, Nicholas Streit and Trederick 1. Streit were defaulted for failure to file anseers.

Adam streit filed an answer claiming to be the owner of a leasehold for an unexpired term under a lease to him of a storeroom in the building on the premises made on march 1, 1904, by the defendant Frederick M. Streit, and running five years to March 1, 1909; the answer alleges that the jury in the condermation proceedings fixed the value of this leasehold at 1889.



Adam J. Hasper answered that the County Clerk of Cook County, Illinois, on May 16, 1000, executed and delivered to Frederick H. Streit a tax deed conveying to said Utreit the lots in question, which tax deed was recorded on May 26. 1990; that thereupon said streit went into possession of said property; that on, to-wit, the 10th day of January, 1905, said Streit, by the name of Fred H. Streit, and Caroline M. Streit, his wife, conveyed the property in question to Kasper by quit claim deed, which deed was recorded on January 13, 1005; that beginning with the taxes and assessments due for the year 1999. the said Streit, and subsequently this defendant, paid all taxes and assess ents levied against the said lots; that from the time the title to said property was acquired by the said Ctreit, the said Streit, and subsequently this defendant, were in continuas possession of said property until this defendant was dispossessed by said Jouth Park Commissioners under the condemnstion judgment; that of the sum of 15,916.25 held by the complainant for the benefit of the owners and parties interested in the above property in question, he is entitled to the sum of 5,553.25, being the amount awarded to the owners or parties interested in the property, less the sum found by the jury to be the value of the leasehold interest in the property: prays that a decree be entered directing the complainant to pay to him the sum of \$5.536.25.

Cutherine 3. Pay and Thomas Pay, her husband, answered that in 1893, deorge 8. Cooke was the owner in fee simple of the premises in question and that in that year he died testate at Louisville, Kentucky, leaving a will by which he gave a life estate in an undivided one-half of the land to each of his two cons, John Esten Cooke and 8. Brent Cooke, with remainder to the children of said two sons per capita and not per stirpes; that thereafter, said sons conveyed their life estates in said

we give the experience of a gradual or the first grade of the alternative to a control of the second of th and the second of the second o in the property of the property of the province of the first the same of the sa 1111 e live The same of the same the state of the s the transfer of the control of the c war of the second of the secon and the state of t ter to the second of the secon and the second of the second o of entire the second of the se the state of the s

lots by quit-claim deeds to Catherine I. Pay, who is still the owner of said interest, and claims to be entitled to receive the value of said life estates out of said fund; Thomas Pay admitted that he has no interest in the premises in his own right.

John Esten Cooke and H. Brent Cooke set up the same facts as are contained in the answer of Catherine S. Fay; they drit that they have sold and conveyed their interest to Catherine S. Fay and claim nothing out of the fund in question. The other Cookes answered that they are the children of John Esten Cooke and H. Frent Cooke, and that under the will of their grandfather, George E. Cooks, they are the owners of the remainder after the expiration of the life estates owned by Catherine 5. ray and that they are entitled to the whole of the fund in question after the present value of the life estates belonging to Catherine J. Fay is deducted. Evidence was taken before the chancellor on May 5, 1910, on the bill and the aforesaid answers. The case was then taken under advisement, and thereafter the chancellor announced a decision to the effect that Masper had failed to show title in himself and that irs. Fay and the Cookes were entitled to the entire fund. The defendant Kasper than filed an amend d answer on June 1, 1911, alleging that on way 10, 1000, the County Clerk of Cook County, executed and delivered to Frederick h. Streit the lots in question, which said tax dead was recorded on May 23, 1900; that thereupon the said Streit went into possession of said property; that on January 10, 1908, said Streit. by mans of Fred W. Streit, and Caroline W. Streit, his wife, conveyed the said property to the defendant in error by quit claim deed, recorded on Jaruary 13, 1005; that beginning with the taxes and assessments due for the year 1899, the said streit, and subsequently the defendant in error, paid all taxes and assessments levied against the said lote; that from the time

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the title to said property and acquired by the said streit, the said streit, and subsequently the defendant in error, were in continuous possession of said property until the defendant in error was dispossessed by the South Park Commissioners under the condermation proceedings; that Micholas .treft was the owner of all the buildings and improvements on the said lots and for which the jury in the condemnation case returned a vertica of 1... 190 for said buildings and improvements: that said Nicholas Streit on July Sl. 1900, gave a chattel mortgage to the defendant in error to secure an indebtedness of [3.500, conveying and assigning to the defendant in error all his right, title and interest to all of said buildings and improvements on said lots, which said chattel mortgage was acknowledged and recorded: that subsequently said Wicholas Streit assigned all his right, title and interest to said buildings and improvements and to the condownation fund and judgment to the defendant in error; that Micholas Streit constructed said buildings and improvements on ald premises and at all times owned the same as personal property and invested large amounts of money in said buildings and improvements and that the defendant in error to now entitled to the value of said buildings and improvements as assessed by said jury and said court; that of the sum of 5,916.25 held by the complainant for the benefit of the owners and parties interested in the property, he is entitled to the sum of 12,400 for buildings and improvements on said lots, and also the sum of [3,226.25 for the value of said lots.

After the filing of the amended answer by the defendant in error Rasper, the court heard further evidence and thereafter entered a decree containing in part the following:

The court finds that on the issues made by the amended answer of Adam J. Hasper and the answers herein of the other definants, the equities as to the sum of \$2,000 are with the de-

ferdant, Adam J. Rasper, and the equities as to the remainder of said sum are with the defendants, John Laten Cooke, Jr., Llizabeth L. Cooke, Pauline H. Cooke, H. Frent Jooke, Jr., Ballie M. Cooke, Lydia M. Cooke Wickliffe and Catherine J. Fay.

The court further first that Micholas Streit occupied said premises under leases from deorge E. Jooks, the owner of said property, the lease on said Lot 1 being dated october 15. 1890, and the lease on said Lot E being dated February 1, 1898: that under and by virtue of said leases said Nicholas Streit owned whatever buildings and improvements he placed upon said precise: as his personal property with the right to remove the said: that subsequently while occupying said promises under said leanes said Micholas Streit constructed the buildings and improvenents upon said premises and expended money in the construction and repair of the same, which said buildings and improvementa revained upon said promises and were upon said provises at the time the jury in the condemnation suit above referred to assessed the same as being of the value of 12,400; that the said Nicholas Streit on the 21st day of July, 1900, for a good ard valid consideration transferred said buildings and improvemonte by chattel mortgage to the defendant, gdam i. dasper, and that said chattel mortgage in fact operated as an assignment and pais of all the right, title and interest of the said Nicholas Streit to the defendant, Adam J. Knaper, and that subsequently a written assignment and bill of sale of said premises was executed by the said Nicholas Streit to the defendant, Adam J. Hasper, of all of said buildings and improvements on Lots 1 and 2 3 ove described. for which the jury in said condemnation suit assessed the value of 12.800: that the said defendant, Adam J. Masper, at the time of said condemnation suit was the owner of all of suid buildings and improvements and sas satisfied to the sun awarded for said buildings and improvements on said Lots 1 and 2

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by said jury in said condemnation suit: that said adum J. super was cotitled to 12,000 of the fund pa d into the hands of the Jounty Treasurer by the Jouth Park Commissioners in aid suit for the value of anid buildings and improvements on said lots, and is now entitled to the same; that said defendunt, O therine .. Fay, is ontitled to receive out of the sum of 3.121.25 assessed as the value of said Lots | and . by the jury in said condemnation case, the value of the life estates of A. Brent Cooks and John Esten Cooks at the date of said condemnation. and said defendants, John Esten Cooks, Jr., Elizabeth B. Cooks. Pauline M. Jooks, H. Brent Cooks, Jr., Sallie J. Cooks and Lydia w. Jooks Sickliffs, are each entitled to receive one-sixth of the remainder of said sum of \$3,806.98 after deducting the value of the interest of each Catherine 3. Fay; that the sali defendants, Satherine J. Pay, John Esten Cooks, Jr., Elizabeth ". Jooks, Pauline L. doole, N. Frent Cooke, Jr., Jallie J. Cooks ar! Lydia i. Looks lickliffs, have in open court stipulated between themselves that the court need not determine the value of said interests separately, but may award the said fund to them jointly.



IM. JUSTICE SCANLAR DELLYERED THE OPINION OF THE COURT.

This writ of error is sued out by Catherine S. Fay and the Cooke heirs to reverse that part of the deares that awards \$2000 to the defendant Kasper.

The sole question at issue in this case is whether the defendant in error, Kasper, or the plaintiffs in error, Quiterine 3. Fay and the wookes, are entitled to that portion of the fund awarded by the jury in the condemnation proceedings as the value of the improvements on the two lots in question. It is now conceded by the defendant in error, Kasper, that the part of the decree that gives to the plaintiffs in error the value of the land is correct. The chancellor awarded to kasper the value of the improvements, and the plaintiffs in error have such out this writ to reverse this portion of the decree and they slaim that they are entitled to the value of the improvements, and that the decree in this respect should be reversed with directions to the chancellor to award to then the value of the improvements.

The one first case on for hearing before the chancellor on ay 5, 1010. In their sworn answer the plaintiffs in error claimed that they had the legal title to the property, and that they are entitled to the entire fund in the hands of the County Treamer. The defendant in error, Fasper, in his sworn answer, claimed the entire fund (save the amount of 1300, the value fixed by the jury in the condemnation proceedings of the alleged lease-hold interest of Adam Streit in the premises in question), on the grounds that he had a fee simple title to the property by other of title under the Limitation act. In his amount hap realless on May 18, 1000, and that from that time said treit mas in possession of the premises until January 10, 1000; that

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on that date Easper, under a quit claim dee from said Streit, sent into the possession of the premises and retained possession of the same until the south Park Commissioners took possession under the condermation proceedings. Then the case was reached on the trial call, the counsel for Kasper would not consent to an is ediate trial of the saune until the counsel for the plaintiffs in error stipulated that Frederick H. Streit, if present, would testify that he (said Streit) acquired his tax deed on May 18, 1960, to the premises in question for a good consideration and without collusion with anyhody, and that he was in possession of the premises from said date until he guit elaised the same to Kasper on January 10, 1905, and that he (said .: treit) delivered the possection of the premises to Kasper on said date, and that Easper was in continuous possession thereafter until the South Park Commissioners too' possession under the condernation proceedings. Journal for Emaper admitted in open court that if the limitation title of Kasper failed, the plaintiffs in error had the logal title to the property. During the hearing of the evidence, counsel for Easper also made the rollowing admission: "If my tax deed is not good, that is, if my color of title, seven years payment of taxes and possession is not good, we haven't any defense to this action." Both sides at this hearing regarded the improvements as part of the realty. It was condeded that Nicholas .treit sas at one time in peasession of the property in question under two written leases from George .. Cooke. One of these leases expired on February 1, 1107. and the other on November 1. 1885. It was further concoded that after the expiration of the said leases, lightles Streit remained in possession of the premises as a temant from year to year, until he abandoned the premises. The defendant in error, Resper, contended that said streit abardened the premises some time prior to May 16, 1900. The plaintiffs in

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error insisted that the said Strelt abandoned the pro lees in December, 1990. on the hearing asper introduced in evidence a lease dated Earch 4. 1904, from Frederick H. Streit to Misn streit of "the storeroom situated on the south and owner of doth street and Princeton avenue, known as 450f Princeton avenue." dee of the althesass to this instrument is Nicholas Streit. Wy his action in witnessing this lease, Micholas Streit, in affect, auknowledged that he was no longer in possession of the promises. erolorick A. Streit, the lesser in this leave was actively engaged at this time in an effort to create a title to the premises hostile to that of the plaintiffs in erver; but, however suggestive this action of dicholas Strelt in witnessing the said least may be, we must assume that it was not a collusive act, broads of the positive statements of the two Straits and Resper that Frederick utreit too' and maintained possession of the previous without collusion with amybody.

entirely upon the claim that the plaintiffs in error had abandoned the premises some time prior to May 18, 1900 - the date that Tasper asserts that Tredsrick I. Street took possession of the premises. Is maintain this claim, Emeptr was, of source, compelled to assert and prove that Richolas Street, the former tenant of the plaintiffs in error, had abandoned the premises prior to the last mentioned date. The plaintiffs in error conceded the contention of Emper that Sicholas Street abandoned the pre is a prior to May 16, 1800 - in fact, they claimed that his abandonment took place at a much earlier date.

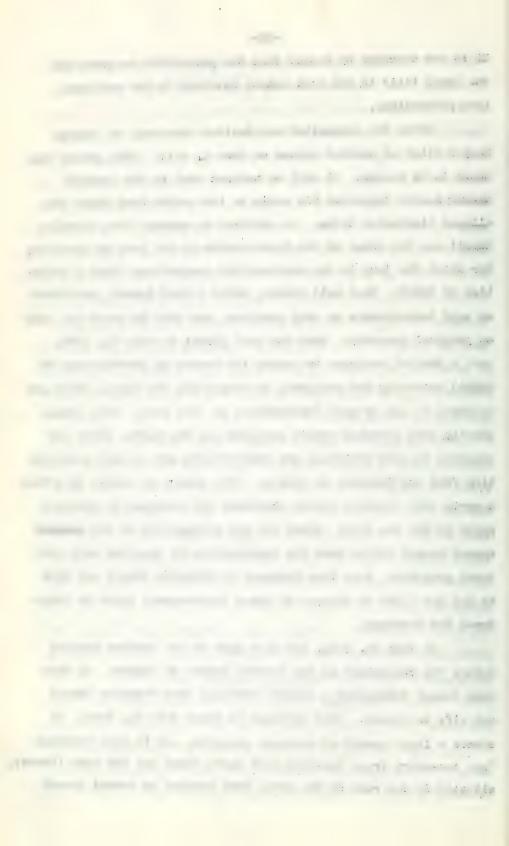
the seven years Limitation set. In this he failed. The chancellor, after a lengthy sensideration of the pleadings of the proof, decided that the plaintiffs in arrowhed the legal title to the precises, and that they were estilist to the mains fund.



It is now conceded by casper that the plaintiffs in error had the legal title to the real estate involved in the condensation proceedings.

After the elegestler had decided adversely to heaper. maper filed in absolut drawer on June 1, 1011. This and ser was swern to by Resper. It will be noticed that in the amended anever kaspor reassorts his oldin to the entire fund under the alluged limitation title. In addition he asserts that Micheles strait was the owner of the improvements or the lots in question. for which the jury in the condomnation proceedings fixed a valuation of [0,000; that said Streit, while s land tenant, constructed said improvements on said provides, and that he owned the same as personal property: that the said treit on July 21, 1000. gave a chattel portgage to Kasper (to secure an indebtedness of [3.00) conveying and accigning to Fasper all his right, title and interest to all of said improvements on said lote; that a beequantly said lebelue Strolt assigned all bis risht, title and interest in said buildings and improvements and to said occurrencetion fund and judgment to Kasper. This answer of Masper in effect a corto that lobolus stroit abundoned the premious in question prior to May 18, 1900. Under the now allegations in the amended and for Raugur claims that the improvements in question were personal property: that they belonged to Wichola: itroit and that he had the right to dispose of these improve ante aft r he abondoned the premises.

On June 24, 1911, the case came on for further hearing before the chancellor on the amounted appear of lasper. At this time Ausper introduced a shettel mortrage from Wicholas Streit and wife to Easper. This mortgage is dated July 21, 1900. It ecvers a large amount of personal property, at it also includes for two-story frame building with store floor and the burn (frame), situated in the rear of the same, both located on leased ground



as No. 4500 Princeton avanue, Chlongo." The consideration fixed ir the chattel mortgage is 3000. Hosper also introduced a bill of wall from Wicholas Stroit and wife to Mapper of the buildings and improvements upon the proclass in question and "also all the sure of soney awarded by the jury in the judgment of the court in the aundownation proceedings, and all the interest that they may have in the veryiest and judgment." This bill of hale was dated buy web. 1911. It will be noted that this instrument was not resorted until the day after the amended wester of naspor was riled. It will also be noted that "icholas Straft, the grantor in this bill of sale, was defaulted in this acro. Minchas Streit, she and salled as a sitness by Laper, testified that he cold out the business he was conducting on the prepiece in question to his brother Adam Streit on March 8, 1899, and unt the said adam strait conducted the business after that time and that he (Nicholas Streit) woved out of the buildings in December. 1900: that he did not lease the buildings to Adum streit; that were itruit remained in possession of the fulldings from 1 60 until 1807; that no one paid Min (Nichola. troit) any rent for the premises at any time after he vacated the same; that adam J. Hosper is his trother-in-law. The elinase Curulor testified that he never made any ausignment of his interest in the buildings and improvements in question, succept the chattel mortgage of July 21, 1980, to Resper and the bill of sale of May 29, 1911 to Rasper. By way of imposching this statement, the plaintiffs in error introduced a bill of out from lightles Strett to rederick a, atreit, dated august 1, 1000, conveying "the two story frame building and all the sheds and barn, known as 4.00 Princeton avenue, situated on lot No. 1, block 3."

From the sworn pleadings and from the evidence in the case, it clearly appears that disholds shrult nondemed the provises and the buildings and improvements thereon some time

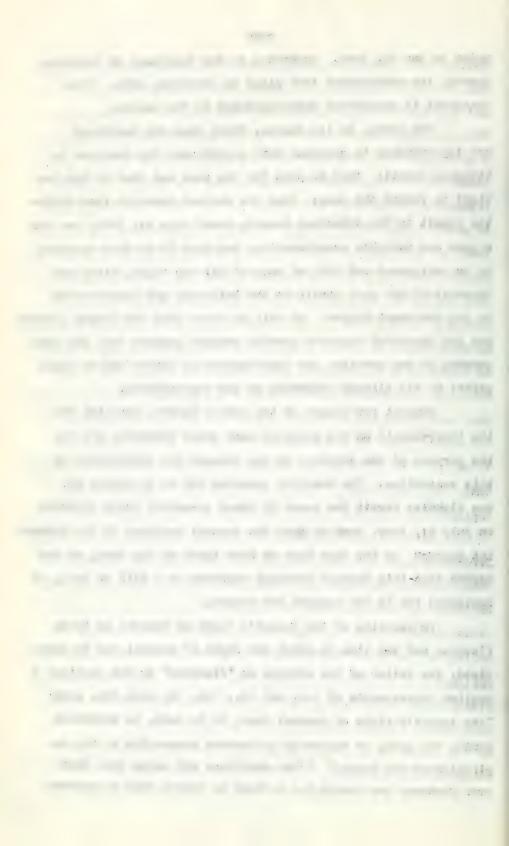


prior to May 16, 1906. According to the testimony of Nicholas Streit, the abandonment took place in December, 1809. This statement is apparently uncontradicted in the record.

The court, in its decree, finds that the buildings and improvements in question were placed upon the premises by Wicholas Streit; that he paid for the same and that he had the right to remove the same; that the chattel mortgage from Nicholas Streit to the defendant Kasper, dated July 21, 1800, was for a good and valuable consideration, and that it in fact operated at an assignment and till of sale of all the right, title and interest of the said Streit in the buildings and improvements to the defendant Kasper. It will be noted that the decree (adopting the theory of Kasper's amended answer) assumes that the abandement of the premises and improvements by Streit had no legal effect on his alleged ownership of the improvements.

Counsel for Kaaper at the second hearing insisted that
the improvements on the premises were trade fixtures, and for
the purpose of the argument we may concede the correctness of
this contention. The material question for us to decide is:
The Michelas Streit the owner of these so-called trade fixtures
on July 21, 1000, when he gave the chattel mortgage to the defendant Easper? In the view that we have taken of the case, we may
assume that this chattel mortgage operated as a bill of sale, as
contended for by the counsel for Kasper.

In speaking of the tenant's right of removal of trade fixtures and the time in which the right of removal may be exercised, the writer of the article on "fixtures" in the American & Inglish Encyclopedia of Law, and Ed., Vol. 13, page 040, says: "The tenant's right of removal must, it is said, be exercised during the term, or before he surrenders possession on the expiration of his lease." "The decisions all agree that whatever fixtures the tenant has a right to remove must be removed



before his term expires, or at least before he guits possession: for, if the tenant leaves the promises without removing them and the landlord takes possession, they become the preparty of the landlerd. The tenant's right to remove is rather considered a privilege allowed to him thun an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it afterwards, because the right to possess the land and the fixtures as a part of the realty. vests immediately in the landlord; and although the landlord has no right to complain, if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture or notice to guit, he has a right to consider them as a part of his property. To same effect see 1 Wash. on Weal Prop. DA; Ewell on Fixtures, 137." Donnelly v. Thieben, 9 Ill. App. 470. Trade fixtures become arrexed to the real estate, but the temant may remove them during his term, but if he fails to do so, he cannot afterwards claim them against the owner of the Droiske, et al. v. Peoples Lumber Co., 107 Ill. App. 286; Taylor's Landlord and Tenant, 9th Ed., Vel. 2, p. 176.

As it is absolutely clear from the evidence that Micholas Streit, when he made the chattel mortgage to Rusper on July 31, 1900, had long since abandoned the previses in question and the buildings and improvements thereon, it follows from the authorities cited that "icholas Streit was not the owner of the so-called trade fixtures at the time of the making of the chattel mortgage to Rusper. Hence Rusper acquired no title to the trade fixtures by, or on account of, said instrument. The so-called trade fixtures, under the authorities sited, because the property of Frs. For and the Cookes when Sicholas Streit abandonal the property.

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The final contention of counsel for Masper is: "that the t mant, Michelan Streit, hel over after the expiration of the lesses (fr m dooks to Streit) and was a temant from year to year: " " " the term t, icholae Streit, after having made a sale of the improvements to defeniant in error, while he was holding over from year to year, and while the improvements were his orn, could not projudice the rights of the venice, Adam J. Maspor, as to the improvements in question." It would see from this contention that the counsel for asper soul; urgs in this court that Micholas Streit was still a tenant from year to year at the time that he gave the chattel mortgage to Masner, although in the lower court keeper, from the beginning to the end of the case, by sworn pleadings and by sviisnos, asserted that the plaintiffs in error had abendoned the premises at a time prior to the mailing of the chattel mortgage. Assuming that Nicholas Streit, after the expiration of the period fixed by the written leases from Socke to himself, was a tenant from year to year, neverthe less, when he abandoned the premises, he surrendered his tenancy. The abandonment of previses by a tenant is a restoration of the occupancy by the landlord. It is not necessary to cite authorities in support of this well known principle of law. As Micholas Streit as a doned the promises before he gave the chattel mortques to Hasper, he was not a tenant from year to year at the time of the giving of the cortgage. We do not wish to be understood we conceding the sontention of sommet that if Nicholas Streit mude a wale of the improvements to Easper while he (Nichelas Strait) and holding over from year to year, that Kusper sould have the right to the possession of the improvements after Ticholas Stroit had abandoned the premises and the improvements.

the decree of the Circuit Court of Cook County will be reversed and the cause remarded, with directions to the chanceller to enter a decree giving the whole fund in question, in the possession of the Jounty Treasurer, to Jatherine b. Pay and the Socke heirs.



arch Term, 1913, No. 105 - 19101

> THE CITY OF CHICAGO, Defendant in Error,

> > vs.

VICTOR JACOBS, Flaintiff in Mrrer. ERROR TO EMPLOYED COURT

1861.A. 120

ER. FEEDIDING JUSTICE BAKER DELIVERED THE OFISION OF THE COURT.

Plaintiff in error Jacobs was charged in a complaint filed in the Eunleipal Court with disorderly conduct in violation of sec. 2012 of the kunicipal Code of Chicage. He waived a trial by juzy, was tried by the Court, found guilty and a fine of \$200 assessed against him.

The contentions that the judgment should be reversed because no plea of not guilty was entered, because no venue was proven and because the trial Judge was prejudiced or made improper remarks, are all without merit.

The testimony on the part of the plaintiff tended to show that the defendant was guilty of discretely conduct. It was met by the denial by the defendant of the acts and conduct testified to by the witnesses for the plaintiff and by the testimony of two witnesses that defendant's reputation for morality was good. We cannot, on the evidence is the record, say that the finding of the Court was against the evidence, and the judgment is affirmed.

AFFIRMED.

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cch Term, 1913, No. 155 - 19154

> ADRA PARRELL, Defendant in Erroy,

> > YB.

SILLIAN J. FARMELL, EMS. MARY FARRELL and ANNIE GALLAGHZE. Flaintiffs in Error.

ERPOR TO MUNICIPAL.

186 I.A. 121

MR. LARSIDING JUSTICE BANER DELIVERED THE OPINION OF THE COURT.

While in view of the conclusion reached by us, the conflicting statements in the transcript of the record in this case may be disremarded, we think it proper to call attention to such statements, to the end that greater care may be observed by the Clerk of the Nunicipal Court in keeping the records of that Court and in making transcripts of such records to be filed in this Court.

November, A. B. 1913, a certain affidavit for replevin was filed in the office of the Clerk of said Municipal Court in words and figures following, to-wit*. Then follows an affidavit purporting to have been sworn to Levember 1s, 1912, before Leonard held, one of plaintiff's attorneys. The transcript than states that "On the 8th day of November, 1912, a certain replevin writ was insued out of the office of the Clerk of said Court". Then follows a replevin writ dated the 2nd day of November, 1912, on which a return of the bailiff is endorsed, stating that the writ was received November 2, read to one of the defendants November 4 and returned November 8, 1913.

INT INNI

Defendant in error Anna Farrell brought replevin in the Junicipal Court November 1, 1912, against the plaintiffs in error to recover possession of cortain furniture. The bailiff was unable to obtain possession of the goods. Love ...ber 9 the defendants entered their appearance and the Court gave leave to plaintiff to file a statement of claim in trover. To such statement was filed, but the parties treated the action as one of trover. The jury found defendants guilty, assessed the plaintiff's damages at 350, the Court entered judgment on the versict, which the defendants, as plaintiffs in error here, seek to reverse. William J. and brs. hary Farrell are husband and wife. Miss Mary Farrell and Annie Gallagher are their daughters. Anna Parrell, the plaintiff, married William Parvell, a son of William . and Pary surrell in 1903, and lived with aim until 1908, when they separated. The evidence tends to show that some one took from the flat where William and Mary Farrell had lived up to the time they separated all the property except the formiture and Lie clothing; that william Farrell hired an expressmen to move the furniture to his father's house and that Lary Jarrell was with him when the furniture was moved.

We shall consider only the question shether the evidence shows any right of recovery in plaintiff against the defendant Annie Callaguer, and shall not express as spinion as to any of the other questions in the case. Annie Callaguer, as has been said, was the daughter of William J. Farrell. She was married August 20, 1911, and September 4 went to Detroit to live. She returned to Chicago August, 1912, and remained at her father's house until Movember, when she moved into a flat. While so at her father's house plaintiff made a written demand on her and the other plaintiffs in error for the furniture in question. There is in the record no evidence tending



to show that are callegher had possession of any of the furniture is question at the time the desand was made or at any
other time, nor that she was then or at any other time claimed
to be entitled to the possession of, or to have any right in
or to, such property. The desand on her and her failure to
deliver the possession of the property were not evidence from
which the jury might properly find her guilty of a conversion
of the property. The judgment is clearly erroneous as to her
and under the rule that a judgment erroneous as to one defendant must be reversed as to all, the judgment is reversed and
the cause remanded.

REVERSED AND MEKANDED.

warch Term, 1913, No.

FIFTH AVENUE LIBRARY SOCIETY, a corporation,

Defendant in Error,

VB.

DR. J. A. CAVANAUGH, Flaintiff in Error. PRECIPTO MUNICIPAL COURT OF CHICAGO.

186 I.A. 123

PR. PRESIDING JUSTICE BAKER
DELIVERED THE OFFICE OF THE COURT.

This is an appeal by the defendant from a judgment recovered by the plaintiff for the amount due on a written contract for the purchase of books.

the objection that the plaintiff could not maintain the action because the demand had been assigned to a
third party is without merit. At common law such an action
must be brought by a party to the contract. Under the Codes
of some of the States the action must be brought by the person interested. In this State, when the demand arising under
such a contract is assigned, the action may be maintained
either by the original party or by the assignee.

The objection urged to an answer to one of the interrogatories given in a deposition might have been obviated by issuing a new commission and re-examining the witnesses.

Just an objection must be made by motion to suppress before the trial and it is too late to object to the testimony at the trial.

Whether the books delivered to defendant corresponded with the sample shown him was a question of fact on which, on the evidence in this record, the finding of the Court is conclusive.

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In the matter of the letition of GRORGE CHECKESFIELD, on appeal of GRORGE CHECKESFIELD,

VB.

ETELL BOKERBAN, Appellee.

APPRAL FROM COUNTY COURT OF COOK COUNTY.

186 I.A. 137

DELIVERED THE OFFICEN OF THE COURT.

In case for malicious prosecution appellee Like 1 tolernan recovered a judgment for 1800 against appellant Checkesfield. On a ca. sa. issued on this judgment Checkes-field was arrested and thereupon filed his petition in the County Court to be released from such imprisonment. The Court denies his petition, remanded him to the custody of the Sheriff and he appealed.

Ealice is of the gist of the action for malicious prosecution and the County Court therefore properly denied the prayer of the petition, and the order appealed from is affirmed.

AFFIL OLIV.

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March Term, 1010, 40.

339 - 19553

BICHAEL BITTING,

Appellee,

vs.

CALLMET & SOUTH CRICAGO RATENAY,

Appellant.

APPEAL FROM SUPERIOR COUNTY.

186 I.A. 138

BELIVERED THE CRIMION OF THE COURT.

This is an appeal by the defendant street railway on pany from a judgment recovered by plaintiff sitting
for assumes alleged to have been sustained by his through the
negligence of the defendant.

An electric street car operated by defendant ran south in Commercial evenue to sind street and turned east in that street. That the car stopped with the front end north of the north cross walk in Sina street is not disputed. In three counts of the declaration plaintiff aversed that intending to become a passenger ne. while the car was standard still, stepped on the platform and attempted to get on the car, and that the defendant negligently started has sar and thereby he was thrown from the car and injured. The third count alleged that while the car was moving very slowly plaintiff attempted to get on the car, but the defendant negligently, etc., caused the speed of the car to be suddenly increased and thereby he was thrown from the car and injured.

There is in the record no evidence tending to prove the allegations of the third count. The only evidence in the record tending to prove that the car was standing

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still when plaintiff attempted to get onto it, and that mile he was doing so the ear was started forward, is the testimony of the plaintiff, which is conflicting and unpatisfactory. He first testified that the our was standing still men he attempted to bourd it, and then testified that he attempted to get on the rear end of the car and that wen he did so the rear end of the car had reached the corner of bind street. On angas-examination he testified in substance that before he attempted to board the car it had started forward and gone from 40 to 50 feet; that the front end of the car was then "half ever the street". op. osed to plaintiff's testimony was the testimony of the corductor, who was on the rear platform, of Kuetzer, who was also on the rear platform, of Kasper, a newsboy, who was on the car and getting ready to get off, of hogan, who was on the rear platfor : when the car reached which street and there left it, of Werden, who was on the sidewalk and saw the plaintiff attempt to board the car, all of whom stated that plaintiff attempted to board the car while it was in motion, going around the curve.

we think that the only conclusion that can properly be drawn from the evidence is that the car was not standing still when plaintiff attempted to board it, but was then in motion. It follows from what has been said that in our opinion the evidence fails to show that the defendant was guilty of any negligence in the operation of the car, and the judgment will therefore be reversed.

REVERSED.

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The Court in this case finds as a fact that the evidence fails to show that the defendant was guilty of the negligence alleged in any count of the declaration.

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March Term, 1915, No.

JOHN C. MALE. Plaintiff in Error,

VS.

EDWARD A. FERGHSON, UNION CENTRAL LIFE INSURANCE GO. and CHARLES W. SAMPSON, Defendants in Error. ERROR TO SUFERIOR COURT

1861.A. 156

MR. JUSTICE BROSE DELIVERED THE OFINION OF THE COURT.

The plaintiff in error in this case, John G. Hale, was aucd in 1906 before a Justice of the Frace in Gook County by Adward A. Ferguson, one of the defendants in error herein, on a promissory note given by him to said Pergusen in 1904 for .215.55. Judgment Leving been given against I im for 1200 by the Justice he appealed to the Circuit Court of Cock County, where a judgment for the same amount was entered against him on a trial de nove, the jury being instructed by the Court to find a yerdict for that amount. From this judgment of the Circuit Court Hale appealed to this Court. This appeal was decided by the Branch Appellate Court on June 30. 1908. The judgment was affirmed. After alluding to certain evidence offered by the appellant below, the exclusion of which he argued was error because it was addissible to show fraudulent representations in securing the execution of a note or to show a partial failure of consideration even to the extent of varying the terms of the instruments, the opinion of the Court said: "However this may be, there is no evidence tending to show that the execution of the note was secured by fraud", and further on - "We find no evidence tending to show any failure of consideration nor any legal defense to the note sued upon."

We have recited this because in the present appeal

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the appellant hale takes the ground that all that the court decided was that the evidence excluded was not competent in law but might be in equity, and that in the absence of the evidence in the law suit, the judgment in that suit was correct. But the context makes it apparent to us that the "evidence" alluded to by the Court which did not tend to show fraud or want of consideration, was the evidence offered, heard and then stricken out, and that the decision of the branch Appellate Court was in effect that no defense existed at law or equity to the note, even admitting all the defondant asserted in his excluded evidence.

After this affirmance, Ferguson, failing to obtain satisfaction of his judgment, brought suit against the surety on the appeal bond (one helia E. Hale) in the Hantcipal Court of Chicago and obtained a jac, Lost against her for \$244.45 and costs. From this judgment an appeal was taken to this Court, which affirmed the judgment June 19, 1911.

brought a bill in equity in the Superior Court to enjoin Ferguson from proceeding to collect the judgment against him,
which, after the affirmance of the judgment against helia H.
Hale, he amended to include a prayer for an injunction quinst
the enforcement of that judgment also. This amended bill was
desurred to by Ferguson, the desurrer setting up that the face
of the bill showed that the matter was resembly addicate and
that there had been laches in prosecuting it. The demurrer
was sustained and the bill dismissed July 8, 1912. July 13,
1912, the complainant moved to vecate the order of dismissial
and to make helia H. Hale a party complainant. This motion
being demied, Letia H. Bale on July 20, 1912, joined complainant in another motion to the same effect and this motion was
also denied. Thereupon John G. Bale sued out this writ of

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Court. The matter set up in the bill would have been available at all, in law as well as in equity. It had been decided not to be, and the matter was res adjudicata in the Superior Court and this Court.

The decree of the Superior Court is affirmed.

AFFIRMED.



rol Lerm, 1913, No.

ARTHUR T. VREELAND. Flointiff in Error.

VS.

WARREN VREMLAND, Defendant in Error. ERROR TO EURICIPAL COUNT OF CHICAGO.

186 I.A. 183

MR. JUSTICE BROWN DELIVERED THE CFINION OF THE COURT.

This writ of error to the Aunicipal Court of Chicago brings before us that which in its practice is equivalent to the sustaining of a decurrer to a plaintiff's declaration and giving juagment for the defendant on the plaintiff's standing by said declaration.

The plaintiff in error here was plaintiff below and filed a "Statement of Claim", which the Court ruled was insufficient to sustain an action.

The plaintiff declined to take advantage of leave to file an amended or more specific atatement of claim which was given him, and elected "to stand by his criginal state ent of claim". Thereupon the Wourt entered a judgment of nil capiet and for cests against him and he sued out this writ of error.

The question therefore is whether the "statement of claim" in question did state a cause of action.
The statement proper is:

"Flaintiff's claim is upon the contract hereto attached for money had and received by defendant, to-wit, \$1000, received by defendant as one of the heirs of John J. Vreeland, deceased, by virtue of a settlement of the suit to contest John J. Vreeland's will; said sum is one-sixth of the amount received by defendant."

281 A.130F THE PERSON NAMED IN COLUMN of course the determination of the question whether the statement sets up a cause of action depends therefore on the contents of the instrument attached. That instrument recites itself to be an agreement between the plaintiff, Arthur T. Vreeland, of the one part, and five other persons, parties of the second part. It is signed and sealed by all.

Arthur T. Vreeland is described as the only heir at law and next of kin of Laura L. Vreeland, whom another clause shows to be living. As, according to the old legal maximum demo est hacres viventis", Leura L. Vreeland had no heirs, this was a misdescription, but the meaning is plain enough. He was either "heir apparent" or "presumptive" and next of kin. The other five parties are described as the heirs at law of John J. Vreeland, deceased. The instrument proceeds:

"MINIMAS, each of the parties hereto is desirous of giving the other an equal interest and property which
may come to them from the respective estates of the said
John J. Vreeland and Laura E. Vreeland (upon her death) as
heirs or beneficiaries under any last will and testament;
and

WHEREAS, the parties hereto are desirous of joining together in the contest of the slleged will of the said John J. Vreeland and Laura b. Vreeland (upon her death) as heirs or beneficiaries under any last will and testament; and

NOW THEREFORE, it is hereby agreed by and between the respective parties hereto, for and in consideration of the above mentioned precises and of the sum of one dollar each to the other paid, that the party of the first part shall have an equal interest with each of the several respective parties of the second part in the estate of the said John J. Vreeland, deceased, the same as he would have did he bear the same relationship to the said deceased as the parties of the second part; and that each of the respective parties of the second part shall have an equal interest with the party of the first part in the estate of laura L. Vreeland upon her death the same as they or either of them would have upon her death did they bear the same relationship to her as does the party of the first part.

And it is further agreed by and between the parties hereto that in the event of the death of the said saura h. Vrecland, testate, taking the party of the first part a beneficiary under ner will to all or any part of her estate, then the parties of the second part shall each be entitled to one-sixth of the preperty or estate so bequataed to the said

party of the first part.

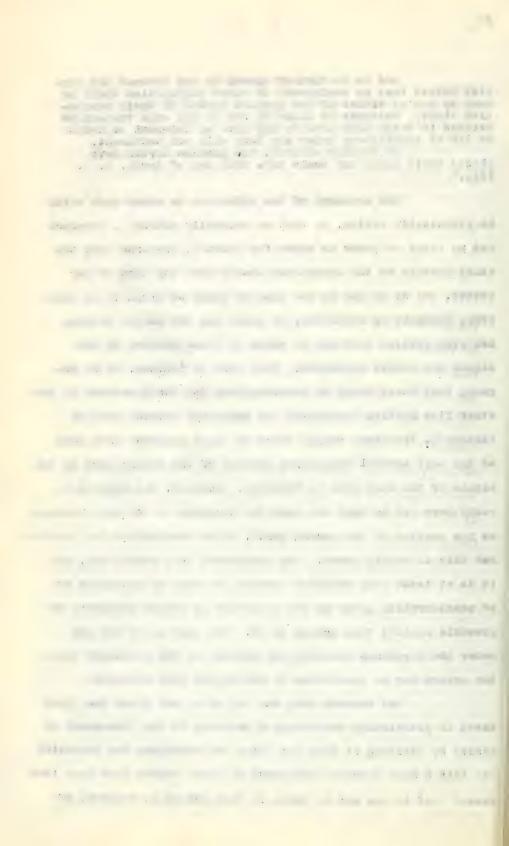
ATTRACT The second secon the second secon The second secon 100 The state of the s THE PERSON NAMED IN COLUMN TWO IS NOT THE PERSON NAMED IN COLUMN TWO IS NAMED IN COLUMN TW will be a substantial to the substantial terms of the substantial terms

And it is further agreed by and between the parties hereto that no assignment or other disposition shall be made by any or either of the parties hereto of their respective right, interest or claim in and to the said respective estates in which they have or may have an interest as heirs at law or beneficiary under any last will and testament.

IN WITHESS WHEREOF, the parties hereto have placed their hands and seals this 25th day of April, A. D. 1910."

The argument of the defendant in error upon which he principally relies, is that as evidently Arthur . Vreeland had no right or power to agree for aura .. Vreeland that the other parties to the memorandum should have any part of her estate, and as he had at the time no right or claim to it whatever, incheate or otherwise, he could and did assign nothing nor even promise anything of value to those parties by his signed and sealed agreement. From this it follows, it is argued, that there being no consideration for the agreement of the other five parties (including the defendant herein) that he (Arthur J. Vreeland) should "have an equal interest with each of the said several respective parties of the second part in the estate of the said John J. Vreeland, deceased, the same as he would have did he bear the same relationship to the said deceased as the parties of the second parta, it is ineffective and invalid. But this is hardly sound. The instrument is a scaled one, and it is at least very doubtful whether the want of mutuality or of consideration given by the plaintiff is either pleadable or provable against this action on it. The suit is at law and under the pleadings provided for actions in the Punicipal Court, the action may be considered to correspond with covenant.

But however this may be, we do not think the Court erred in practically sustaining a securrer to the "statement of claim" by striking it from the files and requiring the plaintiff "to file a more specific statement of claim within five days from date." If it was not in error in that action it follows, of



course, that it was not in error in rendering judgment for the defendant when the plaintiff failed to comply with the order.

The "statement of claim" did not state a cause of action in any view.

The agreement or covenant was, as above stated, that Arthur V. Vreeland should have an equal interest with each of the other five signers of the memorandum in the estate of John J. Vreeland.

The "claim" is stated to be "for money had and received by defendant as one of the neirs of John J. Vreeland by virtue of a settlement of the suit to contest John J. Vreeland by virtue of a settlement of the suit to contest John J. Vreeland by virtue of a settlement of the suit to contest John J. Vreeland's will." Received from whom and from what: And why: And when? Was the 1000, which "is one-sixth of the amount received by defendant", a part of the estate of John J. Vreeland? The cevenant and the claim do not articulate, and without some intervening connection, the statement is altogether too vague to show a valid claim. If plaintiff wished to make it more definite and precise, he was given an a portunity but failed to avail himself of it.

The judgment of the Runicipal Court is affirmed.

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CHICAGO IRON AND METAL COMPANY, a corporation,

Plaintiff in Error,

VS.

JACOB BERKSON and MYER BERKSON, trading as Berkson Bros., Defendants in Error. Error to
Municipal Court
of Chicago.

186 I.A. 194

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit in replevin, in which the jury found that plaintiff was not entitled to the possession of the property taken.

Both parties were dealers in scrap iron, and the controversy arcse out of negotiations concerning a sale of scrap iron by the defendant to the plaintiff. It is not in dispute that the parties agreed upon a price per ton on a quantity of iron in defendants' yard, the quantity to be determined as weighed in the yard upon delivery. Plaintiff paid \$500 in cash and proceeded to remove the iron, and had taken out a quantity which, at the agreed price, amounted to nearly \$500 worth, when the defendants refused to allow plaintiff to remove any more iron, whereupon this suit was brought.

Plaintiff claims that the sale was a completed transaction, and hence it was entitled to the possession of the iron. On the other hand defendants claim that it was a "spot cash" sale, no goods to be removed until paid for. After giving consideration to the conflicting testimony of the parties, we see no reason to disagree with the conclusion of the jury that the plaintiff failed to establish its claim as to the character of the sale, and that the greater weight of the evidence rather inclines toward the claim of the defendants.

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It further appears that when plaintiff had taken away about \$500 worth of iron, for which it had previously paid, defendants requested plaintiff to pay more money before any more iron should be removed, and that plaintiff promised to do so, but that plaintiff failed to keep its promise; that defendants repeatedly told plaintiff that it must pay before more iron could be taken out, but that plaintiff failed to make any further payment, and thereupon defendants refused to allow plaintiff's employes to remove any more of the scrap iron.

Under the contract of sale as established by the evidence, plaintiff was not entitled to the possession of the iron until it had paid for the same, and hence the verdict of the jury was correct and the judgment proper. The fact that plaintiff had not taken quite all of the iron for which it had paid did not entitle it to the possession of all the iron remaining in the yard, and we find no demand made for the delivery of any iron for which plaintiff had paid, not yet delivered.

Other points are discussed by both parties which do not modify this conclusion and do not call for comment.

The judgment is affirmed.

AFFIRMED.

March Term, 1915, No.

FRANK A. KRASA, Defendant in Error,

V 21 .

MITT W. Robbins. Flaintiff in Error. meron for municipal court of chicago.

186 I.A. 198

BE. JUSTICE SCHORELY DELIVERED THE CRIMICA OF THE COURT.

This is a suit for commissions said to be earned by plaintiff in securing a purchaser of defendant's property. Upon trial the jury returned a verdict for the plaintiff.

Plaintiff testified that in February, 1911, he was authorized by the defendant, through her son and alent, to secure a purchaser for her property in Fest Ladison street for \$14,000. He immediately began to work, and in May or June of that year interested Alex and Saluel isenstein, who made an offer of \$14,000. This offer was communicated to the defendant and was declined, and plaintiff was told by defendant's agent that the price of the property had gone up. Plaintiff then secured offers from the same parties of \$14,500.

15,000 and \$15,400, but all of said offers were refused, and finally plaintiff was told by the defendant that the property was not for sale. This was in deptember, addressed the defendant and Alex distincted continued their negotiations and the property was sold to Disenstein in the following month, October, for \$16,000.

It is claimed by the defendant that plaintiff's testimony was weakened by cross-examination and that he was contradicted in many respects by other witnesses.

It was populiarly for the jury to determine the facts, and we see no reason for concluding that the verdict favorable to plaintiff's side of the case is anifestly assinst

the greater weight of the evidence. As do not agree with the contention that in every unse the testimony of two or more witnesses must necessarily have greater weight than the testimony of a single opposing witness.

The facts in this case are like those in Hafner v. Herron, 165 ill. El4, where the court said: "It is sufficient if the sale is effected prough the efforts of the broker, or through information derived through him. "" It is also true, that, where the sailer consummates a sale of property upon different terms than those proposes to his agent the latter will not be thereby deprived of his right to commissions." To the same effect are the decisions in Rigdon v. Nore, 226 ill. 382; Wilson v. Enson, 158 ill. 304; Henry v. Stewart, 185 ill. 448, and Wright v. No-Clintock, 136 ill. App. 438.

complaint is made of rulings of the court on evidence, and also of the commet of plaintiff's attorney upon the trial. After giving consideration to these mints we are of the opinion that there was no error in these respects sufficiently important to require a reversal.

The judgment is affirmed.

APPLICATES.

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March Term, 1913, No. 279 - 19285

J. L. ELDER, Appellee,

VS.

THE FITTSDURGH, CINCINHATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant.

ARTIAL PROM KUNICIPAL COUNT

186 I.A. 199

HA. JUSTICE ACCURELY DELIVERED THE OPINION OF THE COUNT.

This is an appeal from a judgment obtained by plaintiff for 4465 for damages to an automobile owned by him and struck by an engine belonging to the defendant. Flaintiff has filed no brief in this court.

The accident occurred the latter part of October. 1911, about 7:20 . I., at the Tizabeth street crossing of the track of the defendant. At this point there is a single track running due east and west between 58th and 59th streets. While Elizabeth street runs north and south and crosses the railroad track at right angles. The track is above the grade of Elizabeth street and is reached by a slight incline. On the east side of Elizabeth street is a coal yard surrounded by a fence the south line of which is over 22 feet morth of the north rail of the track, there being nothing between the fence and the railroad to obstruct the view eastward.

On the night in question Peter Ruhl and George Lammers, after having driven r. Alder, the plaintiff and owner of the machine, to his residence on lest 55th street, proceeded west on 55th to Llizabeth and turned south on Elizabeth. As they approached the railroad track an engine with one or two cars was going west over Elizabeth street.

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Kunl, who was driving, stopped the automobile at the foot of the slight incline running from the grade of Misabeth street to the track, which was about 10 or 14 feet north of the north rail. He waited until the engine and cors had proceeded westward about 50 feet. Foring all this sime the engine of the automobile was running. After the engine and cars had passed blizabeth street bull started his machine up the incline; he looked neither to the east nor to the west, but straight ahead. He renemed a point within two feet of the north railroad track men, looking east, he discovered an engine, with the headli, at lighted and bell ringing, 15: feet east of lizabeth street and coming toward the crossing at the rate of 10 miles an hour. auhl testified, he gave the engine of his automobile more gas, which caused it to choke and stop on the track. An effort was then made by both men to push the automobile off the track, and they succeeded in moving it south over the track except the rear sheels. Buhl then ran east on the south side of the track for a distance of 30 feet, calling for the engineer to stop. The locomotive did not stop but hit the automobile. All this time the bell on the locomotive was ringing and the headlight lighted, and the fireman and engineer testified that they could see from 20 to 25 feet ahead of the engine, the engineer testifying that the first he saw of the automobile was when the locomotive was on the east crossing of Elizabeth street; that he was then running about eight miles an hour, and that it was only a second after he saw the automobile until it was struck: that as soon as he saw it he set the air in energency and reversed the engine, but the rail was damp and slippery and the engine slid on the rails about 40 to 60 feet sest of Elizabeth street: that when he first set the brakes he



was about 10 or 15 feet from the automobile. There were no lights on the automobile and no signals or warning given aim by anyone that the automobile was on the track.

The fireman testified that he did not see the automobile or any person until after the engineer told him of the occurrence.

We are of the opinion that this accident was caused by the failure of the aen in charge of the automovile to exercise ordinary care. There was nothing to prevent then from seeing the approaching locomotive with its headlight burning if they had looked. Leither mes there saything to prevent then from hearing the riming of the bell on the approaching locomotive. The testimony shows that it was a very dark night, and we cannot conceive of anyone in the exercise of ordinary care driving an autocobile on a dark night upon a railroad track, where it is known that trains are frequently passing, without the slightest concern with reference to mether or not a train was approaching. Luch conduct has been held to be contributory neglicence parring a recovery in so many cases that further discussion is unnecessary. Alon, such cases are: Lovenguth v. city of alcomington, 71 all. 138; thicago tity Ry. Co. v. Dinsmore, 162 111, 658; Beidler v. Branshaw, 200 Ill. 425; Wilson v. Illinois Central R. R. Co., 210 Ill. 603; Howes v. Chicago & E. I. R. R. Co., 217 111. 500; Chicago & Alton R. P. Co. v. Williams, 87 Ill. App. 511; Cleveland, C., C. & St. L. Ry. Co. v. Sparks, 122 Ill. App. 400; Chicago, B. & Q. R. H. Co. v. Back, 136 Ill. App. 425; New York C. & H. R. H. Co. v. Faidment, 168 Fed. 21.

Finding, as we do, that plaintiff, through his agents in control of the section, was guilty of negligence mid contributed to the accident in question, the jumment is reversed without remanding the cause.

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FINDING OF FACT.

The court finds that the plaintiff, T. L. Elder, was guilty of contributory negli, ence which coused the accident upon which this suit is based, as charged in the statement of claim herein.



March Term, 1917

In re Estate of CATHERINE WELCH, deceased.

On the appeal of JOHN H. O'BRIEN,

Appellant,

VB.

MARGARET WELCH,

Appellee.

Appeal from Circuit Court, Cook County.

186 I.A. 200

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

In a proceeding under section 81 of the statute on Administration of Estates, the appellant, John H. C'Brien, upon citation appeared in the Probate Court, and after hearing the evidence the court found that he had in his possession \$985.10, the property of the estate of Catherine Welch, deceased, and entered an order directing that the same be paid to the administratrix. From this order appellant appealed to the Circuit Court, and he there appeared and defended, and after testimony had been heard the Circuit Court ordered him to pay this money to the administratrix; and from this order he has appealed to this court.

Appellant's objection to the sufficiency of the affidavit filed by the administratrix in pursuance of section 81, supra, is answered by the decision in Wade v. Pritchard, 69 Ill. 279, that where the party appears and goes to trial he waives any objection to the sufficiency of the affidavit.

As to the point that all parties shown to be interested in the property or controversy should be brought before the court, it is only necessary to examine section 81, supra, to ascertain that it is not necessary to make the beneficiaries of an estate parties to such proceeding; they are in fact already parties to any proceeding in the course of administration of an estate.

In re Estate of CASHERINE

On the argeal of John 1974,

Appellant.

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MARGARET WELCH.

Appoal firem Firewit Court, Firewit Court,

MR. JUSTICE MODURERY DALLYRRED THE OFERIOR OF THE OFUFF.

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Appellant's objection to the sufficiency of the affidavit files by the administratrix in pursuance of section 61, guarais answered by the decision in Wade v. Fritchard, 68 III. 275, that
where the party appears and gods to trial he waives any objection
to the sufficiency of the affidavit.

As to the principles all parties chown to be interested in the property on centroversy should be brought before the could, it is only necessary to examine section CI, supra, to assertain that it is not necessary to make the beneficiarios of an estate parties to such proceeding; they are in fact already parties to any proceeding in the course of administration of an estate.

The real controversy concerns the claim of appellant that this property was given to appellant by Catherine Welch to be held by him in trust for the benefit of certain persons. The elements necessary to constitute a gift inter vivos are stated thus in Telford v. Patton, 144 Ill. 611 (620):

"It is essential to a donation inter vives, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, that there be 'such a change of possession as to put it out of the power of the giver to repossess himself of the thing given.' (1 Parsons on Cont., marg. page 234.)"

To the same effect are Selleck v. Selleck, 107 Ill. 389; Shafer v. Manning, 132 Ill. App. 570, and Divine v. Stepanek, 176 Ill. App. 61.

In the case before us the evidence fails to establish a gift inter vivos in trust. Appellant was Mrs. Welch's agent with reference to the sale of certain real estate, and collected the money therefrom which he retained, of which the fund in question is a part. He testified that he held this money subject to Mrs. Welch's orders, and he explicitly says that if at any time during her lifetime she had asked for it he would have turned it over to her. We are of the opinion that the entire testimony shows that Mrs. Welch and the others who knew of the matter considered the money to be hers, to be spent or disposed of in whatever manner she saw fit during her lifetime, without any intention of parting with its control.

The judgment of the Circuit Court was right and is affirmed.

AFFIRMED.

The real controversy concerns the claim of appellant that this property was given to appellant by Catherine Welch to be held by him in trust for the banefit of certain persons. The elements necessary to constitute a gift inter vives are stated thus in Telford v. Patton, 144 Ill. 611 (660):

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To the same effect are Selicok v. Selicok. 167 Ill. 388; Shafer v. Manning, 182 Ill. App. 576, and Divine v. Stepanek, 176 Ill. App. 610.

In the case before us the evidence fails to establish a gift inter vives in trust. Appellant was Mrs. Welch's agent with reference to the sale of certain real estate, and collected the money therefrom which he retained, of which the fund in quertion is a part. He testified that he held this money subject to Mrs. Welch's orders, and he explicitly says that if at any time during her lifetime she had asked for it he would have turned it over to her. We are of the opinion that the envire testimony shows that Mrs. Welch and the others who knew of the matter concidered the money to be bors, to be spent or disposed of in whatever manner she saw fit during her lifetime, without any intentior of parting with its central.

The judgment of the Gircuit Court was right era is

AFFIRMEL.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and twelve, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. HENRY B. WILLIS, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 215

BE IT REMEMBERED, that afterwards, to-wit: on the 12th day of March, A. D. 1913, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

en de la composition della com

Gen. No. 5836

The People of the State of Illinois.

Defendant in Error.

37.02

Error to McHenry.

Nowo Frioni, Plaintiff in error.

186 I.A. 215

Dibell, J.

Romo Frioni and three others were indicted in the gircuit court of Mollenry County, All the counts of the indictment were quashed except the fifth, sixth and tenth. The fifth count charged that the defendants, in mid county Irandulantly conspired with each other, with the fraudulent and calicious intent feloniously to obtain by false pretentes the soneys of the Citizens State Bank of Orystal Lake, on Illinois corporation, and to obset and defraud said tank of the same. The sixth count was substantially the same. The sunth count charged that said defendants, in said county, ir woulently intending to get into their poncern on a large our of money, of the value of, to-wit \$860, a more particular description of which was to the grand jurors unknown, of the moneys of the Citizen's State Bank of Crystal Lake, an Illinoi - unununtion banking cornoration, by fales and ir amusent means, did framiulantly and coloniously compare to ther with each other and oth other persons whose moses War unknown, to obtain by false pretenses said aur of money of the moneys of the Citizen's State Bank of Crystal Lake, with the intent to cheat am defraud said bank. Trioni placed not guilty, and was tried alone, and was convicted and sentanged to imprisonment in the panitantiary, and so may a fine He sued out this writ of error to reverse the judgment.

So far as appears from the record before us, it is weatful if there is even a preponderance of evidence that

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to Pomple of the State of Tilinois.

Defendant in Trave.

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Aumo Friend, Plaintiff in server. 1861.A. 215

bell, J.

Home Frient and shrue o'term see indiaced in the ent alls to winner all ill the country of the country of the ar-. Ctment w re quashed entery the thitle, shits and leads. as fifth count charged that the Fellow area, in and county thelubushi with the occess of the besignmon yeth the incululant as unitary ental yel ministo of place though the full cooks. litinois corporation, and to chest and defer on eath and or and the six of the continuous for the continuous and . the in count charmed that and deferrence, in the country, a full of motorrape of this of the of militarian glanels om of noney, of the taken of, lowest base, a none which the seription of which was to in their functs unknown, a. carried the Cirlagn's State damb of Greetal laba, an The article of modification or information, by fallow this eriginos gimedalendis fine glimalahari did ganesa ins. um to the with each coiner and eath other versons those in tes we will now to obtain by false pastered and out or erray moneys of the Catison's Dark Flack of Orgetal Lale, incing the intent to chest and delivered and bank, Friend - to rullby, and run this close, and run corvicted an ana ensi b ya in her grailmitions wit at in mostrout of land . income with a strong to a verse to be strong and the bar so fix to early from the treat before us, it is

tail cometive to commencement a mere at each

to defemiant is guilty. True, the jurors had an opportunity which we have not, of seeing the witnesses. But to sustain a conviction upon this evidence, it is material that the record should show that the jury were properly instructed. The fifth instruction given at the request of the people, in telling the jury what was sufficient to sustain a charge of conspiracy, entirely emitted the alse of false protinges. The conspiracy must have been to obtain by file pretenses, in order to meet the charge in the three counts above stated. The eight instruction given at the request of the people, after stating the rule of law that the defendant is an autod to be innecent until year at is reached finding him guilty, further said: "This rule of law is not meant to provent you from heims convinced or an milt of the defendant at any time during the trial when the evidence, if any, is sufficient to so convince you of his guilt, and if you are convinced by the evidence at any time during the trial of the guilt of the defendant in manner and form as charged in the indictments, beyond a reasonable doubt, and there is no other subsequent evidence which raises in your mind a reasonable doubt of the guilt of the defendant, and you remain so convinced until all of the evil ence is in, then w should find the defendant guilty." The effect of this instruction would naturally be to give the jury to undertand that they could arrive at a conclusion of the defend-.nt's guilt before the hearing of the evidence was completed, nd after being convinced of his guilt, they had a right to remain so convinced, unless other subsequent evidence raised in their minds a reasonable doubt of his guilt, whereas the time question to be determined by the jury is a later liter all the swidence and arguments and instructions were been heard, they have a reasonable doubt of his with it

the defendant is rullty. True, the jurors had an opportunity high we howe not, of seeing the witnesses. But to sustain a conviction upon this evidence, it is saterial that the accord should show that the jury were properly instructed. This fifth instruction riven at the request of the propie, in eginio m misrace of instriction ass fair yout oil intile . restrictly selol to insuels sit beddime ylerious, your igno ne conspiracy must have been to obtain by false pretenses, evode stance sand and he agrade edd teem of mehre above ent to temper and the movie montaintent thing and . in India pargia, blies shifter the role of her that the chiral is grabball bedoner at forbriv . Ithru tresonnt ed of bamuest im mulity. further wald: "This real to let to not to in refer and to take ... to beckives which nort now shave the any time during the trial when the swidenes, if any, La sufficient to so convince you of his ruilt, and it rou foint of the think and the stables on the bearings begrade so much the termine in subsects bedt to filling and to in the indictments, beyond a reason ble doubt, and there is a laim snow mi mentar souls commbave insupordum wedito many the abrahamal aid to this ent to town a land and Ri at some hve ell to lis litur beomitmos os mise y a should find the defendant __ilter." The off of at its: -more of yard sele arth of all milesetten bluce moltowaten - teles ed lo m haudomoo a sa avirue bluos gods sads bads in the many and a second to the second of th and after being conviced of his rulls, toy '. ' . '. it is ration at maline to unsagine as to each month of continuation In their minds a reasonable fouls of his lift, in well to and the adoption to be determined and of moreoup and The mediter with it ton appeal to appealing out the rest fine to and the said in this is a ron or not in the interest of the milit. Its

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gives the jury to understand that if they are still convinced on his guilt when all the evidence is in, that conclusion is to remain regardless of the arguments of counsel and the instructions of the court. It tells the jury that they should findthe defendant guilty if they are convinced of his milt at the close of the evidence, whereas the presumption of innocence is to remain with the jury until, after they have heard the evidence and the arguments of counsel and the instructions of the court, they retire to their jury rook and are there satisfied of his guilt beyond a reasonable doubt. The tenth instruction directs a verdict of guilty, and contains no reference to the evidence, and does not require the jury to find his guilt from the evidence. The listanth instruction applies to the defandant only the proposition that they may take into consideration the fact, if such is the fact, that he has been contradicted by other withouses. There were other sitnesses who were contradicted hat proposition should have been made to apply to all of the witnesses, and not to the defendant alone. The thirteenth instruction given for the people, relating to the subject of reasonable doubt, was a stock instruction, often amproved, except that there was inserted therein the following: "To acquit under the influence of doubts unreasonably created from whatever cause is a vittual violation of the juror's oath, and an offense of great magnitude against the interests of scciety." We regard this as an effort to frighten or drive the jury to a conviction , and we think the language unauthorised. In all these respects we re and the instructions as erroneous and injurious to the defendant.

For the errors indicated, the judgment is reversed and the cause remanded.

to understand that if they restill convenced is guilt when all the evidence is in, 'har conclusion is si : Lerando re pinsangum sit fo secunter at menet ul remotions of the court, It take the jury out that tid it tendence or your is thing inchasted editable to antigrous of the element for the carting the greaters the .it Assaud to stasingth out far somebtve and brase your stantions of the court, they retire to train from out and see there satisfied of his " fit begon" a rarau b.: and a The tends instruction directs whether of pullty, and been fore generality and a semenotian on animona or the the jury to link his guilt from the redictor. The and instruction applies to he defendent enly the manthat a residentian part state of their and the index of hetphis water has been substituted by our in the state of the last In see, there were citer transer who were convincently Listed glens of each mand by a bloom's molficogoug and Line Lines of . med a defended of the for the character and To the fibre and of publication pagesquest well merely not to the (habban, radio, ancharathanh incha , bar, daub) that there was inserted therein the rolloring: "To o the under the intimense of doubte unrecrossibly exected it . Instal a if to gottal the footby : at each the fit to probablish and terrors angularyon toric to be mobile we on the contraction of the contract of the form of the first of the contract of - Lay to a converse a term state in length the inhorized. In all a core respects we may this individual .tasha ital rift of the horizon has abonor off and here was at the glock old pres think order and the

Andrews panel

PATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
burt, in and for said Second District of the State of Illinois, and keeper of the Records
d Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
id Appeliate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one thou-
sand nine hundred and thirteen.
Clerk of the Appellate Court.



201

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and twelve, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. HENRY B. WILLIS, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk. 186 I.A. 216

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 12th day of March, A. D. 1913, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures collowing, to-wit:

m. 5856. & 5857

P = Curiam

Propie for use etc. appellant.

John L. Witsman, at al appeal from LaSalle. 186 I.A. 2

The two cases above entitled were actions of debt on the clicial bonds of Witzeman as circuit clerk of LaSalle County revering two terms in said office. In each case all breaches igned in the declaration wars dismissed anout the second or ach, which related to naturalization fees. In each case the defendants demurred to the second breach, and the demurrer was sustained, and the plaintiff elected to abide by the courter and there was judgment office a minst plaintiff.

Appeals in actions at law lie from final judgments only. To make these orders final, they should have adjudged "that the printiff take nothing by his suit, and that the defendants go ...ce without day" as held in Seghetti v Perry Coal Co. 169
Til. App. 488; Ajax Rubber Co. v Gray, 179 Ill. App. 377, and Puple v Johnson, 179 Ill. App. 467; and in the cases there rited, and In Wenom v Fossick, 213 Ill. 70. For the reasons in the court below, and we have no jurisdiction to decide the marity of the controversy. It would be idle for us to ignore the defect, and decide the merits; for, if we should affirm the action of the trial court and an appeal should be resecuted to the Supreme Court, our judgment would be tracted as void, as held in Chicago Portrait Co. v Chicago Orayon Cr. 217 Ill. 200.

The appeals are therefore dismissed, with leave to each

Appeals dispissed

l m. 5886, a 5667

People for wee sec. appellant.

A. I a 8 I A. 2

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or L. Witsman, et al appelles

Curtam

The two cases shove entitled sers actions of the countries in the countries in bonds of Witserum as circuit cirts of his his Countries avering two terms in said office. In such cases all branches mad in the Couloration were dismissed early? In society of the children were dismissed early? In society of the children for the coulor is such in a coulor demanded to the season is such in a relative to the season is such in a relative to the season is such in a relative to the season of the cross of the children and their factors and the plaintiff a countries and the countries of the countries and the countries and the countries of the countries and the countries and the countries.

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TATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
ourt, in and for said Second District of the State of Illinois, and keeper of the Records
ad Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
aid Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the

sand nine hundred and thirteen.

seal of the said Appellate Court, at Ottawa, this ______day of ______in the year of our Lord one thou-

Clerk of the Appellate Court.



(910)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and twelve, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. HENRY B. WILLIS, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 217

BE IT REMEMBERED, that afterwards, to-wit: on the 12th day of March, A. D. 1913, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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11386

Gen. No. 5887/

The People of the State of Illinois.
ex rel Charles Agnew, Pltf. in error.

VS

Error to LaSalle.

Edward Graham, et al Defts in error. 1861.A. 217

The People of the State of Illinois on the relation of Charles Agnew presented a petition to the court below for leave to file an information in the nature of a quo warranto against Edward Graham, F. E. Blakesles and P. J. Truise and were granted such leave and thereafter filed an information charging that said persons were unlawfully holding and executing the positions of mayor and aldermen of the city of Earlville, and the positions of president, secretary and member of the buard of local improvements of the city of Earlville, and prayed that they be required to inswer by what warrant they and each of them claimed to hold and execute said offices. Summons were served and the respondents filed a plea setting up their title to weigh offices. A general and special democrar was interposed to suid ples, and said demurrer was overruled, and the Paople clected to abide by such demurrer, The court entered a rule on the People to reply instanter; defaulted the people for ant of a reply; found the respondents not guilty, and antered a judgment that the defendance recover from the people on the relation of Charles Agnew their costs, ith execution therefor. From that order plaintiff prosecutes this imposel.

We are of the opinion that after the plaintiff elected to abide by its demurrer, thus submitting the case upon a question of law only, the court should not have ruled plaintiff to reply and should not have defaulted plaintiff and should not have entered a finding, and that these matters appearing

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as rel Charles Agnew, Pltf. in srror.

Error to LaSalla.

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Graham, et al Defte in error, 1861.A. 217

of Earths,

The People of the State of Illinois on the relation woled fruos edr of noitities a betrevery wenge astrod " oup a to states an information in the nature of a que . I . Flakesles and Pranch Grand, F. E. Elakesles and P. J. I live and were cranted such leave and thereafter filed an I formation charging that said persons were unlawfully remushing and executing the positions of mayor and caldarmer the city of Early121e, and the positions of president, to administrating and member of the board to be administration of as city of Farlyille, and prayed that they be required to berials medi to doss has yadi instrum isdw yd wow and execute each offices, furnous vers served an biam of eithe tited a plea setting up their title to maid fices. A general and special demurar was interposed to ald ales, and said demorrar was overraled, and the Paupla sing a benefit of the court and shids of bejos. not elypse sir fethuated ; metantent yleger of sigos for -no har graing for adma norman out brund griger s to to since out more to reser ernahnelah wit tait fremphat a ber in the relation of Charles Agmer their costs, with execution Lacone sidt setwossess Thitminia askro tadt mort . roteral

We are of the opinion that after the plaintiff elected a shide by its demurse, thus substituing the case upon a stion of law only, the court should not have ruled plaintiff to reply and should not have defaulted plaintiff and should not have defaulted plaintiff and should a stinding, and these matters expressing

in the record are surplussage. A final judgment after the demurrer had been overruled and the plaintiff had else of to abide by that demurrer would have been "that the claintiff take nothing by its suit and that the defendants go hence without day"x, followed by a judgment for costs, which however should not have awarded an execution a linet the nearly although it might have awarded an execution a linet the relation. There is no final judgment, as held in Seghetti v Berry Coal Co. 169 Ill. App. 488; Ajaz Rulmerz Co. v Gray, 179 Ill. App. 377; Prople v Johnson 179 Ill. App. 467; Vanon v Fossick, 213 Ill. 70.

As there is no final judgment we have no jurisdiction to decide the merits of the controversy. If we should affirm the trial court and an appeal be prosecuted from our judgment to the supreme court our action would be treated as void, as held in Chicago Portrait Co. w Chicago Crayon Co. 217 Ill. 200. The appeal in therefore dismissed with leave to each party to withdraw all papers filed by it.

Appeal dismissed.

nurrer had been everraled and the plaintiff had alsoyed to nothing by its suit and that the defendants go hence about day"s, followed by a judgment for seets, which however and not have awarded an execution against the ramount it might have awarded an execution against the ramount it might have awarded an execution against the ramount of the judgment, as held in Seghetti var. There is no first judgment, as held in Seghetti var. I do. 160 111. App. 406; Ajan Rubberg do. v Gray,

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L there is no first judgment we have no jurishiption of the merits of the centroversy. If we should the the trial court and an appeal be prosequied from a "udgment to the supreme court our sotion would be ed as void, as held in Chicago Portrait Co. w Chicago to all not 111. 200. The sopesh in therefore dismined to soon party to withdrew all papers filed by it.

STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellat
Court, in and for said Second District of the State of Illinois, and keeper of the Record
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of th
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix th
seal of the said Appellate Court, at Ottawa, this.
day ofin the year of our Lord one thou
sand nine hundred and thirteen.
Sand time inducted and character.
Clerk of the Appellate Court.



212

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 223

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

0-m. Wo. 5899

Mary F. Quick, Pitt. is wrete.

Error to DeMalb.

Exame Clayton Patterson, Excr.

&0.

186 I.A. 223 Deft. in error.

Whitney P. J.

Mary E. Quick, plaintiff in error hereafter styled plaintiff, filed her petition in the county court of DeKalb county, Illinois, in the matter of the estate of Henry Patterson deceased for the allowance of a child's award under Section 77 of the statute on the administration of estates. An answer was filed to the petition and the cause was heard in the county court and the prayer of the petition denied. An appeal was taken to the circuit court and heard with the same result, and this writ of error is prosecuted from that judgment of the circuit court denying the prayer of the petition. Numerous errors are assigned on the record, but the argument is confined to points which go to the merits of the controversyonly.

Henry Patterson deceased, died testate in DeKalb County Illinois, March 17, 1910 leaving a will which was made April 28, 1903 in which will the following provision was made for Mary E. Quick, the plain iff, and to which we will have occasion to allude briefly hereafter, "I give and bequeath to my beloved daughter Mary E. Patterson the sum of \$150.00 the same to be received and accepted by her inlieu of any award to which she may be entitled out of my estate, and I make the payment of the same a charge upon my real estate." Mary E. Patterson married and became Mary E. Muick on March 4, 1904. Henry Patterson at the tire of his death left no widow Lut left Charles F. Patterson, Herman Patterson, the said ary E. Quick and Clayton A. Patterson as his children and

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Error to Malain.

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1861.A.2

Thay P. J.

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Henry Patterson of the case of the death left on called

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hat metiling sid as mosts of the model of the addition and

heirs at law. At the time of his death he was a housekeeper and the head of a family. This will was probated and Clayton Patterson named therein as executor, qualified as such and had the estate appraised. The appraisement bill was returned without the allowance of a child's award and this petition was filed by the plaintiff setting up that she was the daughter of the deceased and living with him at the time of his death, her mother being dead, and that she was entitled to a daughter's wa award, and that the appraisars had failed to make an award for her. Henry Patterson lived in Genoa and the plainting tought nebuci there, the house nd whom she married March 4, 1904 lived in Rockford and had an office there and a living room and he voted there. Plaintiff was accustomed to go to Rockford at the close of school on Friday afternoon and returned to Genos on Sunday evening or Monday morning. She lived at her father's home during the week while she was teaching, According to some of the witnesses she did not go to her husband's place of residence more than two or three times in the course of a month. She spent part of the surmer vacation with her husband and part with her father. It appears clearly from the evidence that she and her husband were on friendly relations and living and co-habiting together as husband and wife.

This case falls within the rule established in the case of Evans v Evans, 164 Ill. 614, and the reasoning of the court in that case is applicable to this case. "The family relations that existed between appelles and her husband while she was staying with her father were friendly and in no way adverse. The husband of appelles was the head of his family and his domicils and in contemplation of law his wife's domicils in residence as long as the reasoning were not advesse. * * * Deceased was a householder and the

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This own [alls little row pale established in ".a les of Trance w Trance, let 131. 614, and the standing of court in that a sea is appliethed as interested. *The family relations which also are the court and in a court of the court family and in an appealed of the court family had in an appealed were the thing and in an appealed were the thing and in an appealed were the law and in an appealed on the law law that the appealed the court family and his are their relations of their relations of their relations.

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head of his family. The question arises, could appellee be a member of two families at the same time. The design of the statute is to furnish an allowance to support members of the family surviving the death of the housekeeper for one year. * * * * 80 long as the relation of husband and wife existed and neither of them had any intention of breaking such relations, the residence of the husband was in the eye of the law her residencem, and she could not be a member of another family. **

It is clear to us therefore that the residence of the plaintiff was within her husband in Rockford. The fact that she was teaching shhool did not indicate any separation between herself and husband and of course, it was convenient for her to board with her father during the week. For the reasons stated in the Evans case we are of the opinion that the petition for an award was properly denied .. It is contended there is no reason for denying the award growing out of the father's will in behalf of the daughter. It will be seen from the will which was made April 28, 1902 before the marriage of plaintiff that this provision in regard to a child's award was made. There is no evidence in the record that this legacy of \$150.00 was ever paid to the plaintiff. When she married in 1904, and thereby in legal effect acquired the residence of her husband, she in law ceased to be a member of the family of Henry Patterson, and Ceased to be entitled to a child's award as a member of the family of Henry Patterson,

We cannot see that this provision in this will has any bearing on the case. Judgment of the circuit court affirmed.

head of his family. The question rrises, could a public on a source of two families, at the same tire. The delign of the source is to furnish an ellevance to success to redicte of the family surviving the death of all all houses again to an energe of the family of the long as the reintine of husband and electrical and all entities of them had any interview of the sentitions, the residence of the husband was in the such relations, the residence of the husband was in the typ of the low her residence, and the ocult not he a regiser mother family.

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We cannot see that this provieur it has all mes to the court occurt affirmat.

STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 224

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5837
The People &c. on the relation of Myrtle Pope, appelles.

VB

Anneal from Co. Ct. Les.

1861.1. 224

This is a prosecution for bastardy. There was a verdict of a jury finding appellant guilty and judgment on the verdict and this appeal is from that judgment. The errors assigned and argued are, the judgment of the court is not sustained by the evidence, error in giving the 5th. and 6th instructions for the people and in refusing the 3nd. and 3rd. instructions offered by appellant. Anyother errors assigned are presumed to be waived. On the whole we are satisfied that the evidence sustains the verdict. It has the approval of the trial judge and unless there was reversible error in giving or refusing some of the instructions, the judgment ought to be affirmed.

A pellant's refused instructions are substantially covered by those given for appellant. We see no reversible error in giving any of the people's instructions, unless it might be possible in the 5th. people's instruction. That seems to be supported however by Johnson v The People, 140 Ill. 350 and The People v Bibb, 155 Ill. App. 371.

Judgment affirmed.

Con. No. 5869

The Pergits And on the selection.

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of Myrtla Pope, appelles.

Again from Co. Ct. Los.

Aktroy, r. v.

186 I.A. 224

This is a prosecution for bastandy. There was a verticat of a jery finding appellant quilty and judgment on the radice and this appeal is from that judgment. The surery saigned and argued are, the judgment of the court is not ustained by the evidence, surer in giving the Sth. and Sth. and Sth. and Sth. and Sth. and Sth. and Str. Instructions offered by appealant. Am other errors serigmed in presumed to be waived. On the rhole we are satisfied that the wristence sustains the vertice, It has the creat are satisfied that the wrist judge and unless them to be restricted. It has the trial judge and unless them to the freshile struct in giving or refreshing core of the instructions, the judg ant to be affirmed.

A polient's refused instructions are an etamically corested by those given for someliant. We see no reversible exclusive respicts in invasions, unless it is to possible in the Sch. people's instruction. The test be suppersed bareses by Johnson v The Proving A. A. La. 350 and The Propins With, 155 like in 171.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my band and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

5845



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 L.A. 229

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5845
The People &c. ex rel
Charles A. Johnson et al

appelles

VS

Appeal from Paoria,

John Bushell et al

appellants. 186 I.A. 229

Whitney, P. J.

Appellee filed its bill to enjoin appellant from conducting, operating, rurning or working his asphalt factory within the residence district of the village of Averyville, Illinois, in a manner to cause dense clouds of smoke to issue therefrom or in any manner causing dense clouds of dust, dirt, pulverized stone or other substances to arisa therefrom, or permit any noxious or offensive s ell to emanate from said factory which was offensive or dangerous to the health of individuals or the public. The bill was properly verified and a preliminary injunction was issued thereon. An answer was filed to the bill traversing the material allegations of the same, and replication was filed to such answer, and the cause was referred to the master to take proofs and report his findings. The master took proofs and reported the same with his findings. Objections were interposed before the master and overruled by him, and exceptions were filed to the master's report in the circuit court and overruled. Dec rea was entered in accordance with the master's report, making the injunction perpet al, from which this appeal is prosecuted.

Appellant was making asphalt to put down on the streets of Peoria and operating his plant in the village of Averyville to prepare said asphalt for paving purposes. The plant was located on the west side of the right of way of

. . 5845

People &c. ex rol Charles A. Johnson et al

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John Buchell et al

enpellante. 1861.A. 229

Mitney, P. J.

Appelles filed its bill to enjoy recollent free conducting, operating, revolve or indice in a chirily linetory within the residence distinct of the victor of Averyville, Tilinois, in a monney in cause deman outside of amount to issue therefrom or in any samer or if these circle of Build, 12 to a second state or come bethering of the country therefrom, or person any newtone of orthonive , all to entrum. s v or allocomes at evenuello sow mother yrotoel have wat health of individuals or the public. The bill has prometry ad and a preliminary injunction that is not thouson. An -elis largery of prictarent Life of of beith ear and gations of the same, and epidostics was filed to endisp swar, and the couse was reformed to the city is talls orceds and report the firsting, the rest was proces and afort imported the wind sirt his finiting. Chieffirs send in--inste i. , mid to indirer we one washes set ereled issect from dimmers do no frozen alteranam dir of beliñ ersa a del and observated. Dea res was abtended in smoothness this ins master's report, whire the interestion surject al, from this this appeal is prosecuted.

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a branch of the Rock Island Railroad, which ranin a northwesterly and southeasterly direction, and was adjoining the right of way on the west. This was located on a side hill. It was lower to the west of the factory and there were residences there, mostly tenement houses. The land rose to the east and Rock Island avenue was east of said right of way and the houses facing on it east of the avenue were many feet higher than the plant of appellant. The state's attorney on the relation of a large number of persons who owned houses on the east side of Rock Island avenue above the plant filed this bill to enjoin appellant from so operating his plant as to cause smoke and dust and offensive odors. The right had not been established at law holding this factory to be a nuisance before the bill was filed. Annellant contends there is a serious doubt whether any such injury is inflicted upon the homes of the relators, and that therefore it was error to take jurisdiction in a court of equity before the right was established at law.

The case of The Deaconess Home & Hospital v Bontjes 207 Ill. 553 lays down the rule when such a suit may be brought first in equity. Upon consideration of all the evidence we conclude that the case is clearly within the law as announced in the last cited case and that there is no substantial denial but that the property of the relators upon the uphill side and a short distance east of the plant is injuriously affected and the people living therein made ill, and the front part of their houses made inhabitable uninhabitable while the plant is running. There is a contrariety of evidence in this case but nothing that could be called a conflict on the fact of the factory being a nuisance to the property of the relators. The fact that

of the Rock Taland Railword, Nich rania a worthwesterly and southeasterly direction, and has adjoining the right of war on the west. This was Loomted on a sice hill. Liver over to the rest of the factory of fiers were great dences there, mostly tenement houses. The last rous to the way to third Line to test saw conevs trafel Mook line dame meet higher than the winnt of amountant, The ment's arrowmay on the relation of a large number of hereone was ormed houses on the east side of Kock Telend avenue reave the plant Il this bill to enjoin a pellant from re coeretian ile . tole eriseefte ine dans due edema euse of es in west on and antilled was to ledsissons need for and a to to be a mulared before the fall was filed. A real me oute There is serious deals the Lagran and erell injury is inflicted upon the homes of the relators, and that there-Tre it was error to take fortestion in a court of equity efore the right was established of ins.

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be called a conflict on the face of the relators. It fact that
nuisance to the part of the relators. It fact that

suffer from the smoke and odors does not rebut the evidence that those on the up hill side whose windows were on a level with the top of the chimneys of the plant and on the side to ard which the prevailing wind blows from the plant are not so affected. We conclude there is no substantial dispute in the evidence but what the relators are so injured that the injunction was properly granted and properly made perpetual. The decree of the court below is affirmed. The motion to tax the cost of additional abstract against appellant will be allowed.

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en the tile of the chief whose windows ware on a lessing of the chief of the plant of the chief of the plant of the chief of the chief of the chief of the constant that the chief of the court below is affirmed. The petual be court below is affirmed. The court below is affirmed. The court below is affirmed. The court below is affirmed.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff. 1861.A. 231

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gan. No. 5848

Roy Forney, appellee

VS

Appeal from LaSalle.

Crawford Locomotive & Car Co.

a corp. appella nt.

Whitney, P.J.

186 I.A. 231

Roy Forney, appelles went to work for the Crawford Locomotive & Car Company, appellant on December 5, 1911, and quit apparently on December 21, 1911, and brought suit for a balance claimed to be due on wages on January 13 1913, before a justice. He recovered before the justice and on a jury trial in the circuit court on appeal also recovered from which judgment in the circuit court this appeal is prosecuted. There is no appearance in this court for appellas. The proof clearly shows by appellee himself, and by his brother who was engaged at the same time, that they were hired to work at piece work and not by the day. When they came to be paid on December 20th, or 21st, they found they had only made about seventy cents a day, and after working one day longer, quit, and served notice that they would sue for wages, and they are now claiming for this work, Other men were working by rhw day and were makking 32 cents an hour. These men did not hire by the day, but expressly hired by the piece. There is evidence by appellant tending to show they spent much of the time in idleness instead of at work, The excuse appellee gives is that they asked for the scale and were told that the coals call be parted, and the was not posted, and they therefore side not know by the making so small an amount. The short at you is a mar to the the scale was proved in the office, and the the the at liberty to re into the office and see It. 8 7, when it this were not so and they wished to know what the scale was

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ittney, P.J.

186 I.A. 231

Koy Forney, appolles went to work for its . wford Loceroties & Our Company, oppoliant on December 1 remained angula angurently on Drambor 31, 1811, and broager all grammat no seriew no sub ed of hemialo semaled a ref file A 12, before a justice, He recovered before the justice and fury trial in the circuit court on theel wise riccovers oi Lacr a endt druop dimonio ed: at danaghij doide m outed. There is no spearance in this court for a milita. the proof clearly shows by appelles himself, and by his stan yedf dadf , whit and ak the hogowas new ofw reaft the a self age soft of sea has drow coefe to drow or feat. dome to be paid on Ridambar POth, or Clat. they found thay ad only rais about savency sale a day, and after writing day longer, guit, and rerved needed that they sould tus ting, and they are now claiming for this car, thur or working by the day and core called "By denta an bour. we have introduced and the bib new eco. the picos, There is svidence by appellant that I to short hay apent much of the tire in illerest instable of at rook, stor all to being gait this of eart self-ggs comoze en of were told than the course rough has possed, not can't be the god cont on the reference that hetsog for an ante ou mi les vir londe beers al l'income ma fileme os galles The society was posted in the collection, and the management it mere, to go the entered and one of the thin it fair . Loom will drulk beaution to the type of all of

before they did work by the piece, they should have stopped working until the scale was shown to them. There is no claim that the prices fixed by the scale were unreasonable or unjust They chose to contract to do piece work. They claim to have been told they could make four to five or six dollars a day by the piece, but upon examining the evidence on direct and cross examination it is clear what they were told was that good working had made such wages by the piece. They had an express contract to work b - the piece and were paid by the piece and accepted the pay, and there is no possible ground on which they could be permitted to recover a day's wages. The judgment therefore cannot stand. If this were all, the case would have to be remanded in order to permit appellee to recover, if possible, for the one day which he did by piece work after he had been paid. pellant tells us that that day has been paid for and on motion to retax costs in the court below in the attorney for appellant testified he believed, or had been informed by his client, or some of its officers that that one day had been paid, but there was no proof before the jury. We do not however remand for this reason. When applilee made his application for work he signed an agreement in which, among other things, he agreed if he resigned of his own free will he would wait until the regular pay day for his wages, which the application stated is the 15th. of each month. He did leave of his own free will and therefore, he agreed to wait until January 15th. for the balance of his wages,

if any. He brought suit for it on the 13th, day of January If he had not been paid for that one day, he sued for it prematurely. All pleas are oral before the justice and considered as pleaded, and this agreement is considered as pleaded in abatement.

Appelles eigned this application without reading it according to his testimony, but we are satisfied that under Ohlmeyer v American Steel & Wire Co. 168 Ill. App. 195, he is bound by that application and commenced this suit are accurate. In the fore we are not required to remand the case. Judgment reversed.

before that did work by the rices, they should have etc non working until the scale was shown to them. There is no cult. for any and elds contains a see allow and you ben't economical bads by il or misin yad! . Nor sace of the read of secon ye a at litt ale to swift of most edge block year bior ne y the olens, but woom examining the evaluate on 1 tool and crore exemination to is plear that they were tell was tone .sourced and retain done shan bad mendage boop J. tir electron of trop of trop of the piece in the -so on or erall that pay, that there is no real that this ground on which they could be permitted to recover : fir To .insta formed etalarant themploj edk .aspaw of ... es cabee mi Leger er af or avad bluow sare add . Ila the end and paldherby as proposed of holden at the . I he did by piece work after he and been much. - mr sto lete wo'r hang ha i ama ymh tadt wait an eliet t mel grandian eds si well i tabes wit as evec mater or - he the he wind not a med no phevetled at heilitest fuelled wis client, or some of its a casers that that the lay been paid, but there was no arout tales the harp. We NAME AND ADDRESS OF THE OWN PARTY. THE PARTY OF THE PARTY AND THE PARTY OF THE PART istication for the agent of iron actionalings at is a language, he typesed if he resigned will us out from .4 45 11. 500 The would wait the from they began ed in a lon the auglacation stated is the logic of this wall. in aid leave or his con dres will it is refere, in pant ait until January 1809, for the Court of the surges, THE REAL PROPERTY AND ADDRESS OF THE PARTY O -or -resident all resident and they send the table of the

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

. P. J

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 232

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5849

M. C. Forney, appellee

VS

Appeal from LaSalle,

Crawford Locomotive & Car

Co. a corp. a cellent.

186 LA. 232

Whitney, F. J.

This appellee was a brother of the appelles in case Genl. No. 5848 decided at this term, and hired out at the same time and quit at the same time, and each testified for the other substantially to the same state of facts as in Genl. No. 5840, and the case is preciselly and substantially the same as that case and should be decided in this court the same.

The reasons are set forth in case No. 5848 for reversal of the judgment, and the same reasons are to be considered as stated in this case.

Judgment reversed.

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Y, F. J.

186 LA. 282

This appelles was a brother of the appelles in ourse.

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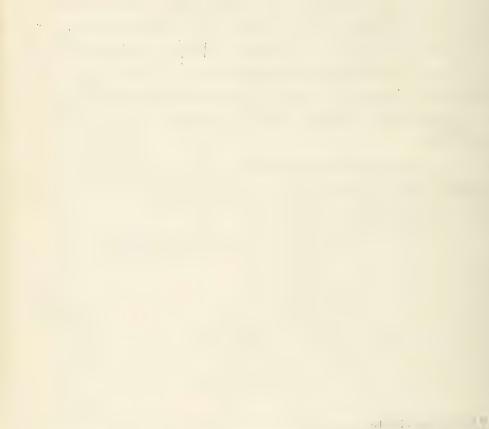
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STATE OF ILLINOIS, Second DISTRICT. Second DISTRICT. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice. P.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 232

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Gen. No. 5850

T. D. Murdock et al

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Appeal from Warren.

The Calgary Colonization Co.

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1861.4. 232

Whitney, P. J.

appellee on a contract for commissions on the sale of land which contract was oral, and there was a plea of the statute of limitations of the state of Manitoba, where the contract was made, and a demurrer thereto, which was overruled. Thereafter, appellee withdrew its plea of the general issue and appellants elected to stand by their demurrer to said plea. Thereupon, a judgment for costs was entered in favor of appellee against appellants and from that judgment this appeal is prosecuted. Said judgment is not a final judgment. A final judgment would have been that "plaintiffs take nothing by their suit and that defendant go hence without day". (Ajax-Grieb Rubber Co. v Gray, 179 Ill. App. 377 and cases there cited.)

The appeal must therefore be dismissed with leave to each party respectively, to withdraw their papers.

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186 I.A. 232

T. D. Murdook and R. V. Figlia, weeks are again appellee on a contract for sometamone on he wis and her with contract was oral, and viers was a promote the analy ute of limitations of the state of "anticia, viers tis contract de made, and a demonstration thereto, then on the other raled, Thereafter, appelled thindred its placed to the missit of house or before stanileons has apart feature, demurser to said plate, Thereupon, a judgment for istrumed was entered in favor of a palies are it a prelimits that on that judgment this imposit in moorestal, but hitem . The first sacrably farth A . Sweet f family of one of the ua v on slot ut to the eliciona elicionalique data nelo defendant to hence earbout dags, (Afine atto sucre "to. v Cray, 178 Ill. Agg. 817 and cases . see tits'.)

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, Do Hereby Certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

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Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff.

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Hen. No. 5859

George H. Molner, appelles

VS

Appeal from Will.

Anna Molner, appellant.

186 I.A. 233

Ceorge H. Molner, appelles, filed his bill for divorce charging adultery. An answer denying the charge was filed and replication and the case was heard by the court without a jury. A decree finding appellant guilty of adultery was entered and this appeal is from that decree. Mumerous errors are assigned on the record, but inasmuch as appellant makes no reference to any of the errors assigned in her argument except that the decree is not warranted by the svidence, all other errors will be deemed waived.

Appellant attacks the decree on the ground that there is no corroboration of the testimony of the paramour and cites Section 8 of the divorce act, which is the section of the divorce act covering decrees on bills pro confesso. She also cites three appellate court cases on the proposition that the causes of divorce must be proven by reliable witnesses. These cases with the execption of Eames v Eames 133 Iil.

App. 665, are cases arising on bills confessed, and in Eames v Eames supra, the point decided was that the unsupported testimony of the party charging adultary when denied by the party accused of adultary and the denial being corroborated was not sufficient to warrant a decree to the party charging adultary.

As we understand the law when a trial is had and issues joined like this one by bill, answer and replication, that the ordinary chancery rules apply and the weight of the testimony is the thing to be considered even though that question may be decided in favor of a party having but one

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Arrest from Bill.

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George H. Molnar, appelles, filed his bill for sivels chareing adults or, An answer denying the clares was filed replication and the case was heard by the opent rations jury. A decree finding ampellant mailty of thickory was absence and and this appeal is from right George. Manerous are assigned on the mocord, but intermed as appeal in the arrors are assigned to any of the errors antigned by the stir encept that the decree is not normanued by the original in her ancept that the decree is not normanued by the original in her

i ellant attacks the decree on the promisions to use all and corroboration of the testimony of the wilmones. The as Section 0 of the divorce and, here are the rectum of a divorce and convering decrees on bills and remisser. The ocurse three are aliate ocurs or see on the proposition of the course of divorce much be nowed by subtable that the ocurse of divorce much be nowed by subtable that the ocurse with the exaception of Force williable that.

1. 665, ore case with the exaception of Force williant to will as the war that debiled was that the unauntarious will y of the party charging adultary then traced by a party charty observed and the dealed being course of adultary and che demand being course.

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witness. The decree is also attacked on the ground that the charge of adultery is not sustained in any case by the testimony of the paramour and authorities are cited on that question.

A review of these cases will show that in a case of a charge of adultery supported only by the testimony of the paramour without any corroborative circumstances and denied by the defendant's testimony, the proof should be held insufficient, if there is nothing in the record tending to discredit the defendant as a witness. In this case the paramour swears positively to the fact. Appellant denies what the paramour says, but she is somewhat discredited in her tastimony by the fact that she denies other circumstances tending to incriminate her that are sworn to by other withesses in corroboration of the paramour, and there is also the proof in the record of other witnesses of her acts showing, or tending to show an adulterous disposition. The fact that she was at the place in question at the time when the act is said to have been committed and was in a confused condition when her husband entered, is testified to by the husband, and this is to some extent corroborative of the testimony of the paramour. The judgment should be affirmed. Judgment affirmed.

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Dibell, Hustice, took no part.

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A review of these dager will show that in weiver A air is unsatisat and yello betrogone wratishs to entrois inches and asonavaments evitanodornoo you toolthe queme -lang list so bloom food with your standard to held inner -sail of paident brooms adt at paiding to dast it that it the defendent as a witness. In this cose the carricust ents positively to the fact. Appellant demiss what the -sad Tof ni feriteresib tafraece at ade jud , ages Tro -inst agometrurones wende saims and thit would sit you secrendi vedro vd of mrowe era fadt red efaminitoni o respection of the paremour, and there is also me a prod. warmer you are below and the appending to the Danbert will all Le to show an adulterous lispost than, The first that the Since all don when he had not self elf the notification of scale eff to an man : maidinnon larebrook a mi saw has beddimmoo meed ev. () . Lumbered antered, to testimised to by the hardward, in the lifter and to evidence or the tree once of ai the emanour, The julyoung elecula is afficiand.

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STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand hine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff 186 I.A. 235

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5868

Western Bottle Manufacturing Co.

a corporation. Appelles

VS

Appeal from Paoria.

William V. Dufner, Appellant.

Whitney, P. J.

186 I.A. 235

This case comes to this court on appeal in a case which originated in justice court, July on the many of it favor of appellee in the court below for \$43.58 and this appeal is the result of that judgment. The arrors assigned and argued all go in effect to the claim that the verdict is not supported by the law or the avidence, and that the court erred in admitting the testimony of the witness Frank Hall as an expert. The defense interposed was that the bottles whose purchase price is here sued for were not lettered as ordered. There is a conflict of evidence on this question and this defense is met by evidence on which there is conflict that appellant accepted a part of the bottles. The court ruled the law to be that appellant was bound to pay for the whole shipment if it accepted a part, which we think is a correct statement of the law. His acceptance depends upon the question whether he in fact wrote a certain post script on a letter which appellant claims was a forgery. The court over appellant's objection heard expert evidence of a witness familiar with typewriting to the effect that the post script was written with the same machine with which the body of the letter was written. Complaint is made that this expert t stimony was improperly admitted. We see no error in that respect.

There is nothing in the isetructions of the court to complain of except the proposition of law above street, and under the evidence we see no reversible error in that. All questions of fact should be held concluded by the verdict

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Arrest from Paoria,

TELES V. Deller, see allers. 186 I.A. 235

This case comes to this court on anneal in w cuss wi before ser fremmed, Judge court, Judgment was entered in while him bladed to I would grown and his additions to persit hear test errors aff. The judgment, firs tree are tree idibaty and dad, wishe and of foothe mi on his began he as not supported by the law or the swidence, and that the man'l areather and to promited set mattinus at have the . Il as an empert. The defense interposed was that the bot-Lemester for every work home even of anima sectioning section well us ordered. There is condited if evidence on this theetof exact dold no complains of sem at camela chick there is Lift that that expectat acceptain in the trans. States, while of the contract the contract that the contract the contract that is the contract that the cont ent of homed the law to be that appallant was bound to ony ow hole whole shipment if it accepted a part, which we -sb sonstance at the law, His socatance denda upon the question whether he im fact work a dertain out script on a letter which appellant cities are a for try. uode live progre buser moiteando altrallegos revo dunco ed Taut feetla sile of mailing with type withen to the sile of tast deady die emides erne ent dit metriev esw tottee two the body of the Larter was written. Complaint is make that PROPERTY PART OF NORTH

There is nothing in the is tructions of the court to complain of exesse the propositional law dorre staist, and nder the evidence se are no reversible arres in shat. All tone of fact chemis be held concluded by the vertice

as there was evidence enough on each question to quetain that verdict.

Judgment affirmed.

The motion by appellee to have the cost of additional abstract taxed against appellant is denied.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 1581A. 236

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

....

Gen. No. 5876
Moritz Roth, appellant.

VS

Appeal from Henry.

dalva State Bank et al appellers.

186 I.A. 236

Whitney, P. J.

On July 24, 1912, Moritz Roth appellant filed a bill against the Galva State Bank, Olaf C. Anderson, Selma Anderson and S. P. Samuelson and Charles C. Wilson, executor of the last will and testament of Charles C. Wilson deceased to have reviewed, reversed and set aside a certain decree entered in said circuit court November 24, 1911, in a certain foreclosure proceeding, wherein the said Calva State Bank was complainant and the said Olaf G. Anderson, Selma Anderson, said Moritz Roth and said Charles C. Wilson were defendants. The said Olaf C. Anderson owed one Nels Mortensen and gave him a note for the amount of said indebtedness, and said Olaf C. Anderson and Selma Anderson, his wife, gave a mortgage to secure said note, which note and mortgage were afterwards sold to the said Galva State Bank. Thereafter the bank fkled a bill to foreclose the mortgage and made said Olaf C. Anderson, Salve Anderson, World Hith and Gourlas C. Wilson defendants and alleged in the foreclosure bill, the execution of the note and mortgage, the purchase of the mortgage and note by the Galva State Bank, a deed by said Anderson and wife to said Moritz Roth, and a covenant in said deed by which said Morttz Roth assumed said mortgage and agreed to pay it. The foreclosure bill prayed for a foreclosure of the mortgage and a sale of the mortgaged premises and that if the proceeds of the sale were not sufficient to pay the bank, that a deficiency decree be rendered against the said Olaf C. Anderson, Selma Anderson and Moritz

Sen. Rr. HPM

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186 I.A. 236

Whitney, P. J.

bill aggines the Galva State Bank, Olds C. Anderson, talet Anderson and S. P. Samuelson and Charles C. Wilson, a results lest will and testament of Charles C. Wilson testast w have reviewed, reversed and set holds a derialn seques starting and paint the analysis bears directly like to bearing reclosure proceeding, wherein the said Oalva State Dank - a compilingst and the said Olaf C. Anderson, Calma Anderson, said Morita Roth and said Charles C. Wilson were "slame-The said Olaf C. Amisrson owed one Wale Martenson and a server him a note for the emount of ental independences, and olef C. Anderson and Selva Anderson, his wife, ive a erst english and and and mote and and and and and the nothern of the sunt oright arise being able ablance the his the his spy from sar croiserst of Illia a heldl hald Half C. Solercor, below helproon, Sories leve to Danger C. Thom defendants and alleged in the for elegate till, the - Cution of the note and mortgage, it were the table of the ge and note by the Galva State Land, dead to read heon and wife to said Morita Roth, and coverses in maid -v in said Mortts Roth assumed assa metrjags of v--and to pay it. Pressente bild equacions of the farm -rang layer from a later a had epaganon out to expects -17 for for and size of to absence out it full has assi Latinum in serve, your office a take that and sale you of the into the means of the means the tenders of the same of

Roth. The defendants were summoned and failed to answer and were defaulted and there was a decres of foreclosure which found the mortgage debt, the sale of the mortgage to the bank, the deed by the Anderson's to said Moritz Roth and the assumption of the mortgage debt by him, and directed a sale of the mortgaged premises, and that if there was a deficiency the complainant in the bill should be entitled to a deficiency decres therefor against the Anderson's and Morttz Roth, appellant herein. Thereafter, there was a sale and report of it and a deficiency decree against appellant for \$317.95 with interest thereon from January 30. 1912 which was the date of the deficiency decree. Then the present bill of review was filed asking that that decree be reviewed, reversed and set aside, and appellant had an order staying execution under said office may bear as until the further order of the circuit court. The fix Galva State Bank demurred to said bill of review. The demurrer was sustained and the bill of review dismissed. In the bill of review the complainant therein sets out as an affirmative fact not appearing in the former record, sought to be reviewed that before the bill of the Galva State Bank was filed he, Moritz Roth had deeded the property to Charles C. Wilson, who was the owner of the mor tgaged premises at the time the bill of foreclosure was filed, The bill therefore, is a bill or review and also a bill in to actors of all 1 of review. It is urged that the original proceeding was erroneous as to appellant because it did not allege that he owned the land when the original bill was filed. It is further contended by appellant that no deficiency decree against him could be made in chancery if he did not own the land when : e bill of foreclosure was filed and that he therefore was not a proper party defendant in the absence of such an allesation.

and rewest of belief and send on the terms of the contract the modely equacioners to serves a deers of foresterne winds Lound the mortgage debt, the jacke of the mortgage so who the party of the Anterson's to party and the bed among the named time of the states of the life, and states and sale of the morteness premises, and that if there was a deficiency the complainant in the bill chould be entitied s'ametabal and become notice in account constituted a of and Morite Roth, appallant herein. Thereafter, there was fraings estably described a had to tropper and of - Les for #317,85 with interest thereon from January he present bill of review was filed seeing ed inclusive or reviewed, neversed and saids, as training annual consisted the other nationers and are univers on had WART THE COURSE STATE BY AND ADDRESS OF THE TANK OF THE PARTY. Telmurred to said bill of review. The demunist like and the bill of veriew dismissed. In the bill ovivernille ma es suo etaa mierest tremislamo est welver in to unpearing in the former record, noughs to is usvisves . as belil has dank stite dalyn Stite bank and the Las Roth had deaded the property to Charles T, Wilson, o was the owner of the mortisged provides at the time the oill of foreclosure was filed, I s bill therefore, is a citi . . ive. 'n ilia : To chutan est ni ilid a pale bao as the unged that the original proceeding as amoneous at to a convert this execute ton bib the general finalls -c. 2 venium' at dl , bakk see Lite lenighto ent made - at min temings somest pensionist on tem, tenilogue yd be could be made in chancemy if he did not an the introduct the tradecast al read bar belief our empedeant to filld of -ciio a. /c : To somethic is mi danker tel yduso usooud si

The proceeding is a bill in the nature of a bill of review in that it alleges the fact, not appearing in the original proceeding, that before that bill was filed appellant had deeded the mortgaged premises to Charles C. Wilson. It appears that appellant had a complete remedy in the other case, first, by demurring to the foreclosure bill, if his legal position is correct, and second, by appealing from the deficiency decree entered against him, or third, taking a writ of error and reviewing the whole proceeding for the failure to find his then ownership of the land. Appellant also could have answered the original bill setting up his conveyance of the mortgaged premises to Charles C. Wilson. He still has a right to prosecute a writ of error from the entire proceeding, and if he is right that it should be affirmatively alleged and found that he owned the premises when the foreclosure bill was filed and that in the absence of such an allegation and finding, no deficiency decres could be rendered against him, he must have complete relief upon the writ of error which he may yet sue out.

Perhaps it is not necessary for us to hold, but we do hold, that under the circumstances stated, he was a promer person party defendant in the original bill and that even if he had conveyed the mortgaged premises to Wilson, he was still liable in that case to a deficiency decree, he having by his covenant agreed to pay the mortgage debt.

We are of the opinion that a court of equity will not require the holder of a note and mortgage to first proceed at equity to sell the real estate and then go into a court of law to obtain a judgment against appellant for any deficiency. Appellant was a party in interest in the foreclosure he was interested in seeing that the proceedings were legally conducted and that the advertising and sale of the land was

In that it alleges the fact, not appearing in U.; eriproceeding, that before that bill was filed ... reliant
desded the mortgaged premises to Charles C. Wilson. It
pears that ampellant had a complete renedy in the other
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that a proceeding, and if he is right that it should to carry alleged one if he is right that he area it should to catively alleged one fount that he aread the premittee when the foreclosure bill was filled and that in the areas of such an allegation and finding, so deficiency decreased against him, we make have nowelite relief

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We are of the opinion that a neuro of aquity it incomes to the holder of a nets and mark, ye we the holder of a nets and mark, ye we take a court at squity to sail the real catate and then ye into a sent.

**Appellant was a party in interacet in the foreclosure of in eacing that the proceedings were legant.

pursuant to law. He had the right to protect himself by crocuring bidders so as if possible to make the land relieve him from his liability, and those rights of his are not at all lost or changed by his conveying the land to Tilson.

Decree affirmed,

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ll lost or changed by his conveying the land

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff, 186 I.A. 241

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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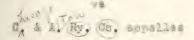
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Gen. No. 5883.

The People for the use of Ernest Dalton, appellant.



Appeal from Livingston.

186 LA. 241

Whitney, P. J.

tics of the peace to recover penalties for the obstruction of highways in the sity of Pantice by the circuit of Chapter 114 of the Illinois statutes. A judgment was rendered in the justice court and appealed to the circuit court where the jury found four violations of the act in question, and fined the company \$10.00 for each violation, making an aggregate of \$40.00 Judgment was entered on the verdict and this appeal is prosecuted from that judgment by appellant.

Numerous errors are assigned as to rejecting and receiving incompetent evidence. A close inspection of the record however, does not show any reversible error in that regard. Complaint is also made that the judgment is contrary to the evidence and that the judgment is for too small an amount. Inasmuch as this judgment must be reversed for the errors hereinafter indicated we make no comment upon the amount of the judgment, leaving that to be fixed upon another trial.

It is urged that the trial court erred in modifying appellant as third instruction on the language Language tions on behalf of appellee, and that the instruction as to the form of the verdict was wrong.

Taking up first the instruction which was claimed to be improperly modified, the statute is as follows "No railroad corporation shall obstruct any public highway by attain any train upon, or by leaving any car or locomotive engine

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tople for the use of rnest Dalton, appellant,

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Access from Livingstor.

1861A. 241

A N. THERES.

This is a qui tem action brought before a jurse of the peace to recover penalties for the obstruction
of highways in the city of Pontiac by uppelles under "ararragh

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out where the jury found four yielastions of the set in

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unerous errors are as igned as to rejecting and reseiving ent swidence, A close inspection of the recor in the ser, does not show any reversible arest in that warred.

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It is urged that the trial court erred is mailifying at limited that third instruction and in piring interpretable that the instruction as we the form of the versiet was wrong.

Taking up first the instruction which was called to be a contract to be a contract that the follows the contract the contract that the contract the contract that the contract the contract that the contract the contract the contract the contract that the contract the contract the contract that the contract

standing on its track where the same intersects, or oposses such public highway, except for the purposs of receiving or discharging passengers or freight, or for taking in or satting out cars, or to receive necessary fuel and water, and in no case to exceed ten minutes for each train, car or locomotive engine.*

It will be seen that by the statute no car or train can be stopped for longer than ten minutes for any purpose. The court modified the instruction asked by appellant by inserting the words "for more than tenminutes" and did not qualify the instruction in the ways pointed out in the statute, so that the jury were in effect instructed that the law is that a railroad company is guilty of obstructing a street if it stops a car or train over any highway crossing for more than ten minutes.

It will be seen by the first and second instructions given for appellant that the jury were instructed that if a railway company obstructed a highway crossing for any purpose longer than ten minutes, they were guilty of a violation of this statute, but the third instruction as modified by the court clearly announced the law that the railway company could occupy a highway crossing with its cars or trains for ten minutes for any purpose, which is not the law.

Complaint is also made that the court modified appellant's instructions so as to missing instruct the jury to "fix the forfeitures or penalty" instead of saying "assess the damages". Insamuch as this is a penal statuts we do not see any reversible error in that modification.

that it did not require the jury to find from the evidence in the case by a clear preponderance of the evidence that

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Complete to also rade that the rows modified at a set this fury to a the tractions so he to abstract the fury to the damenses. Insertable of the traction control of the cary reversible error to that modification.

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appellee was guilty, and that it included the word "clear" before preponderance. Including the word "clear" seems to be sanctioned by the authority of the appellate court; (C. & E. I. R. R. Co. v The People, 44 Ill. App. 652.) and as to the other criticism made we think the jury could not have been miscled into thinking they might find on any basis except from the evidence.

Appellee's fifth instruction is also criticized because by that instruction the jury were told that it was their duty to consider certain evidence pointed out in the instruction. It would have been better to have said by this instruction, "You have the right and it is your duty to consider such evidence in connection with all the other evidence in the case." We should not reverse for the error in this instruction alone.

The instruction as to the form of the verdict is justly subject to the criticism made unon it by appellant, by instructing the jury in substance that it was their duty to fix the same penalty for each violation of the statute that they found from the evidence existed.

For the errors indicated the judgment must be reversed and the cause remanded.

Reversed and remanded.

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Appellee's fifth instruction is also existence less that it was a six that instruction the inswerse fold that it was a six a ty to consider certain evidence pointed out in the action. It would have been rester to have exid by

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or the errors indicated the judgment wast be reversed at its cause remanded.

Reversed and recented.

STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

5890

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

J. G. MISCHKE, Sheriff.

186 I.A. 244

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5890

James M. Swan, appellant

VS

A peal from City Ct. Sterling.

Charles Lathe, appellee

186 I.A. 244

Whitney, P. J.

James M. Swain, appellant, sued Charles Lathe, appellee on a promissory note for \$100.00 before a justice of the peace. We can only gather from the evidence what the defenses were to the note, that were set up in the justice court. and neak ar awant to the sity mark Amellant one defeated in the justice court and took an appeal to the city court of Sterling, where he was also defeated, and he brings this case here on appeal. The note being offered in evidence made a prima facie case for appellant. The question to be determined by us is whether or not the evidence in this case shows such a state of facts as to make out a case which would defeat the note. The only oral evidence in the case is that of appellant and appelle e. The evidence of appellant would make the note valid. The evidence of appellee would leave the note without a consideration. There does not seem to be any defense mentioned in the evidence of fraud and circumvention in procuring the signature to the note. There is nothing in the record to indicate that appellee is entitled to more credit than appellant, and if their testimony is evenly balanced the note ought to prevail.

It seems that one George Gilson owed appellant \$200.00 for which appellant held a chattel mortgage on a mare, which sometime after the giving of the mortgage produced a colt, and the mare and colt or the colt were left with appellas. Gilson went to Colorado on account of ill health and his son Traest undertook to settle up his and life and force letter to appellant telling him that this is and colt laster

Cen. Mo. 5390

James M. Swan, appellant

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1861.A. 244

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Junes M. Swain, spellent, suce Charles Lathe, called on a promiseory note for \$100.00 before a justice the peace. We can only mather from the evidence "to the estant eit mi qu der ener dest, stom est os exem ese con smallered drawn with sid and france on dead ten. Jugo isfested in the furties court and took an apparais to the cate de a stating, where he was also defeated, and he brings this case hare on appeal. The note being offered in evidence to a prima facto case for a mellant. The question to determined by us is whather or not the evidence in the don't want a color of foots and to state a done swore e and defeat the note. The only onal evidence in the unce intile; a To scatchive out . s allegge has tasilegge to tast the time salleggs to sensitive and .Alive con an sales of a leave the note without a constitution. There has not seen be any defence mentioned in the evilence of fraud and ation in producing the structure to the nors. There him in the record to indicate that appairs in initial ar more or dit than a gollant, can if their assure or dit alamosa the note curkt to prevail,

It seems that one George Odison owed appolisht 200,000 owhich appellant hill a cluttel northy a on a wro, which appellant hill a cluttel northy a construction of the mark age and oolt or the polt were left with appellas. Cilson went we Colorade on accesse of ill health and his con frame to action to settle up his affilirs and wrote a liter to appellant tealing him that this care and colt were

with appellee and that appellee would settle what was due appellant. This letter amounted in substance to a bill of sale. The essential part of the letter was as follow "In regard to the balance of the mortgage which is soon due. I left a bay mare and colt in care of Mr. and Mrs. Charles Lathe, Erie, Illinois, Box 176, which I think and trust will settle the amount of the mortrage and interest in full. I transfer the animals to you and you may have them sold if you will it." When this was offered in evidence appellee objected to it as follows, "We object to these letters your honor for the reason they are not written by the parties to this suit and do not pertain to this case. " The court declined to rule on the objection until he had heard further, and then, after hearing some evidence, a general objection was interposed, when the letter was again offered, and the objection was sustained, so that the letter never got in evidence. We think in this ruling the court erred. The objection did not go to the authenticity of the letter or to its not being shown it was a letter written by the person who purported to write it, but it was urged simply on the ground it was not a letter written by a party to the suit, and the last objection made to it was only a general objection.

When appellant applied to appellee and told him the situation, appellee agreed with him upon the giving of this note to settle the balance of the chattel mortgage. This made a good consideration for the note if true, and the testimony of appellant is opposed by that of appellee only, who testified that he afterward learned appellant never had a mortgage on the colt. Appellee also testified on the trial that "this colt was bred from the boy's property."

Under the evidence we see no reversible error in

this little bluew sellacon thrilenny teds has sellacon - due appallant, This letter amounted in substance to i of sale. The essential part of the letter was an follow most at dealit apart more than some and of brane is, I left a bay mere and colt in care of Mr. and Mrs. Charles Lathe, Erie, Illinote, Box 176, whish I think and from and bas end from self to tauome and sittee flix fourt eval yer por inc unimals to you and you releast I . I them sold if you will it. " When this was offered in willowas appelles objected to it as follows, "We object to these a percent you can tank a succession and the man and the second ".sees while of minimag for oil but this whit of estimag end The court decilned to rule on the objection will he and beauti further, and then, after hearing some svidence, a general bjection was interposed, then the letter unt again offered, and the objection was martained, so that the letter never of the experience he within the wife with a low come where I are objection did not to the authenticity of the latter or to its not being shown it was a Letter writing by the parmen to purported to write it, but it was urged simply on the given are not referr a principle to the second bounds. the last objection rade to it has only a memoral objec-.00[4

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Under the evidence we are an entitle off rebul

appellee's third instruction would seem to be misleading, although it may be technically accurate, yet as applied to the evidence in the case it must be given have given the jury a wrong impression as to the real situation of the parties. For the errors indicated the judgment is reversed and the cause remanded.

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the couse remanded.

STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

18611 015

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

EM OF THE APPELLACE COURT.

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T. E. Lundell, appellee

vs Appeal from Co. Ct. Rock Island.

Minnie Schultz, appellant.

Whitney, P. J.

1861.4.245

This is an appeal from a judgment in the court below for \$300.00 in favor of appelles in an action of assumpsit brought to recover commissions on the sale of real estate.

The pleadings were the common counts and the general issus.

A bill of particulars was furnished on motion of appellant as follows "Minnie Schultz to T. E. Lundell - Dr.

To finding purchaser of property of Minnie Schultz, known as No. 521, 15th. Street, Moline, Illinois - \$300.00"

The errors relied on for a reversal of the judgment are:

(1) That the presiding judge was illegally sitting as the judge of the county court of Rock Island county; that he had no jurisdiction to preside as such and his judgment is coram non judice. (2) That the judgment is against the law and the evidence.)3) That upon the facts disclosed by the record, the judgment must necessarily be rendered against appellee and in favor of the appellant. (4) That the court erred in admitting improper evidence on the part of appellee and erroneously overruled a motion of appellant, made at the close of appellee's case to strike out all of the evidence and find for appellant.

A jury was waived and the case was tried by the court.

No evidence was offered by appellant. The county judge of
Rock Island County having resigned, the county clerk called
in the judge who presided at the trial, who was the probate
judge. It is contended that the probate judge could not be
called in by the county clerk to preside over the county
court and that any judgment rendered by him is void.

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T. E. Lundell, expelles

ve Ampeal from Co. Ct. Rook Island,

A Street and the second

1861.A. 245

Whitney, P. J.

This is an appeal from a judgment in the count below for \$300.00 in favor of appellee in or action of assumpait brought to recover count-sions on the sale of real satate.

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To finding purchaser of property of Minnie Schults, known No. 521, 15th. Street, Moline, Illinois - \$300.00*

The errors relied on for a vaversal of the judgment ers:

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2 of the county court of Rock Teland county; 7: t as indicated the county; 7: t as indicated to preside as such and his judgment is avainat the land the swidence. (3) That upon the facts 'isolated by the the swidence.)2) That upon the facts 'isolated by the cord, the judgment must necessarily is represent approach the speciant, (1) That the court salies and in favor of the speciant, (1) That the court of in admitting improper syldence on the part of appellant the expensions, rade at expensionally evertaled a matter of ameliant, rade at the close of appellant the case of appellant.

A jury was maters and the case was inted by the neuro, our our of a sevidence was offered by entailant. The county fulge of look Island County havin resigned, the county alori called in the judge whe presided at the trial, do at the product judge. It is contented that the mobate judge could are be called in by the county case to preside our the county called in by the county sasingers remissed by him to roth.

Thestatute expressly provides that the county clerk in case of a vacancy in office may call in a county or probate judge to sit. (Sec. 239 A, Chap. 37 - Title "courts" - statutes of 1911.)

There may be minor errors of the court in rulings on svidence, but having been a trial by the court, without a jury, and pufficient commetant minimum svinumus sating in the record to sustain the judgment we think no decision can be based on errors and rulings on evidence is vovable to appellant. Therefore, it becomes a case in which the judgment if based on sufficient competent evidence, must stand, and the appellant havin- offeredno evidence at the trial. It must be determined by the evidence offered by the amellae. Much is said in appellants argument about the Tempelland in Titing that resulted from the talk betweenthe agent of the parties, but when the whole recert is investi and it appoint that the appellant offered to sell her property on certain terms and pay \$300.00 commissions to the agent if he would secure a purchaser. It further appears a purchaser was obtained who said he would take the property on the terms proposed. The purchaser afterward came to appellant and tendered the azad deed and trust deed required by the terms of the agreement between them, whereupon appellant said she would have nothing further to do about the sale. She refused to accept the papers or look at them.

Finding that the judgment is sustained by sufficient scapetent evidence, and applied no reversible error in rulings on evidence, the judgment of the court below is affirmed.

ingreenesses or proceeding the county of the county of the second of problical states to cit. (Sec. 238 A, Chep. 37 - Title "ecourts" -

There may be minor expose of the court in mulinge on anddence, but having been a trial by the court, without a jury, and pufficient competent sinkanas evidence a carring in the secret to sustain the judgment we think no decision our co based on errors and rulings on svidenus forceble to appel-Therefore, it becomes a case in which the judgment ins , beets from , samebive the togeto their stand, and the appellant having offereing evidence at the trial, it surt be determined by the evidence offered by the availar. The -the at substance set trode trempare similagre at the at sil to frame entreevist alas out mort besigeer sait a aller. It hat ritravar as broner along and many jud , saituag hat the appellant offered to sell her property on cartain blue, an hi was a select aneign anno 00.00% yaq ban saret secure a purchaser. It farther engener a purchaser wer armus said the would take the promote the turns in fordlerge of emac brewest's resentancy off .besog . That sat you be the gar. Leet fourt the beet week ent bereines and have smalleyer was account, meds meaned smeasure out neve nothing for the do shout the sile. Abs : There's . seed the papers or lock at these.

Finding that the judgment is sustained by asilissest competent evidence, and resing no s residue error in clings deemes, the judgment of the resure below in alliest.

STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

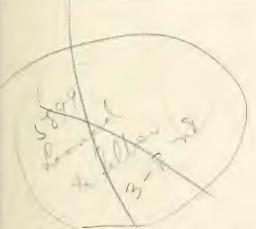
Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 186 I.A. 24



: 111. -

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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STURBER C. PHIST. C. L.

City of Dixon, appellant

VS

Appeal from Lee.

Jacob Mayer, appelles

1861.4.217

Whitney, P. J.

This is an action brought to enforce an ordinance of the city of Dixon prohibiting the keeping and maintaining of a house of ill fame therein. Proceedings were instituted ih the justice court where appellee was tried before a jury found guilty and fined, from which fine and judgment in the justice court the appellee herein appealed to the circuit court of Lee County. On January 15, 1913, a trial was had in the circuit court on the appeal from the justice court and a verdict of not guilty returned and judgment entered thereon, from which judgment of the circuit court this appeal is prosecuted. On the trial in the circuit court appellant introduced certain evidence tending to show that men had sexual intercourse with appellee's wife in his house, and that appellee had been paid therefor, Appellee introduced evidence tending to show that that charge was wholly false. There is no preponderance of the evidence in favor of appellant and no reason is urged or shown why we should interfere with the conclusion of the jury on the evidence that was heard. The court permitted appellant to introduce a transcript of the evidence of a witness who testified for appellant before the justice, who afterward died. This evidence ought not to have been admitted, (I. C. R. R. Co. v Ashline, Admx. 171 Ill. 318.) Nut the witnesses who knew , should have been required to testify what the doud witness testified to before the justice.

Appellant sought also to introduce the sams transcript

ly of Dinon, appailant

Appeal from Leo.

1861.A. 247

James Dayso, organizan

J. J.

and is an action brought to amforce am ordinance of this a to grinianium bas guigend sait guitidinore mount to y Tank of ill fame therein. Proceedings were instituted it ying a stoled being was solleans stody broom soil | and referred the first from which sine out further and was tios court is ampelles harein arms. led to the circuit ourt of Lee County. On January 15, 1915, . titul or 1 1 In the circuit court on the sensel from the justice court fare the decomposit the Lagrater wilks; for to foldrer s sair from thish judeness out the same it doing morn is prosecuted. On the trank in the minuted outri itul terir to mailmes escubiva martnes hesphorini inclience tint the challenge and consecutat Lemes bed me selfunt , we have it then seed had a learne dank bas , espe-# + Compacts darf bracks of attract earch ave described olly feles. There is no prepond .ronde or the eviltance in ingui aran to be set on the set on the fastisc a to to and the transfers with the constraint of the transfer to vidence that was no sk, The wave result to relieve to Introduce a transcency of the event rose of a distance in tertified for a paleant edemy the gratical, the die world ited. This orthonos caret not to bear a mi tor. (I. G. R. R. Co. v Ackidne, Adres, IVL VI., 13:,) Ect no mitesom the who knew , thought here been promised to contilly that the .coit.of one included to be about a remite has.

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of the evidence of John Cashion, but the same was objected to and the court sustained the objection. This was incompatent for the reasons stated, and in addition thereto there was no proof that Cashion was dead, or out of the State, or beyond the jurisdiction of the court. The proof merely was that a certain officer who tried to find him on subpoena as a witness, failed to find him, and this is insufficient to lay a foundation for the introduction in evidence of what he swore to before the justice.

The court refused to permit a witness to testify as to the general reputation of appellee's house for chastity and morals in that community and that is the main question argued in this case. We hold this evidence was not competent under Parker v The People, 94 Ill. App. 648.

The appellant had passed an ordinance declaring the general reputation should be sufficient to convict in such a case as this. The court refused to admit that ordinance in evidence and refused to permit the evidence of general reputation. A city cannot establish rules of evidence.

(Rockford City Railway Co. v Blake, 173 Ill. 354.)

Complaint is made of the refusal of the 5th, instruction offered by appellant. The said 5th, instruction is in substance embodied in the 2nd, instruction for appellant, which was given. The 6th, refused instruction is on the subject of general reputation. This instruction is bad for the reasons hereinabove stated.

The appellant should not be permitted to have a judgment wainst a citizen based on mere hearsay. The hearsay may haveback of it some person who known some fact, but if any such person exists, he should be called as a witness. Again it say grow out of thick or meighborhood and the called as a witness.

evidence of John Grahion, but the erms was objected to and the court sustained the objection. This was incompatent for the reasons stated, and in addition thereto there is no proof that Grahion was dead, or out of the State, or extend the jurisdiction of the court, inspress merely as that a certain efficer who tried to find him and this as insufficient the same these, failed to find him, and this as insufficient to lay a foundation for the introduction in evidence of what he swore to before the justice.

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the appellant should not be nerwitted to have a july that the a cities on have hearway. The harvey the vore velocity of it some person who knows some fact, but it say on person exists, he should be called us a retracts, that

the rights of an individual to permit him to be convicted of an offense against morals and chastity on mere hearsay.

Judgment affirmed.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AND ALPERCE STATE



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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PRINCIPLE DEPOSITION

Genl. No. 5899.

The Thomas Manufacturing Company, a corporation.

Appellant.

vs.

Christ Thede. Jr.
Appellee.

Appeal from wercer.

186 I.A. 248 Opinion by WHITNEY. P. J.

This is an action in assumpsit brought by a pellant to recover from appellee for certain goods sold and delivered, The declaration consisted of the common counts, to which was interposed the plea of the general insue, plea of payment and a further special plea which alleged that a pellant had not complied with the law of Illinois requlating the admission of foreign corporations. The place of payment was afterwards withdrawn. A similiter was fided to the general issue and a special replication was filed to a pellee's third plea. The replication was one of confession and avoidance of the facts set up in the third plea. Issue being joined, by agreement the parties waived a trial by jury and submitted the issues to the The parties then entered into a written stipucourt. lation of facts, which, to ether with the exhibits attached to said stipulation, constituted all of the widence in the case .

At the time of the making of the contract between appellant and appellee, appellant was a foreign corporation, organized and doing business under the laws of the state of Ohio, and appelles was a resitent of the state of Illinois. The contract was a written one, and its terms, so far as

Banl, Mo. 5880.

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186I.A. 248

This is an action in ascampait brothst by a guillent -t' har also shoot mistres wow selleggs more waveser of ivered. The declaration consisted of the common countri. this, simul largery silt to make plan of the general terms, it is felt hamelia dolf a mig labous radiuf a bno onemyon to -gree picality is and ead driv religiou for bod faelleg a and the carrier of France arrestimes and guidel in redilinia A annuality viravretta est incayaq to in the ducking a fatores a har estal fateres est of built filed to a pailed a third pleas. The ren lower on one of confession and avaidance of had alle set of the 12d glas. Issue being joined, by a greenent the partall of sen al est tabliades have you yet Leint a beview act -milto neithe, a orni ierethe meht meithig eff . fruos lation of facts, which, torether with the embinist thanked to enid all plation, constituted all of the vi ence it eare edd

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terms, so far as the same are essential to an understanding of the present case were that appelles contracted to
purchase three sidedelivery rakes at the price of \$\frac{746.00}{26.00}\$
such. Appelles furtjer egreed to sell as many more
machines as he could findcustomers for, and appellant
agreed to fill any further order received upon the terms
and prices agreed on in the contract.

Prior to the time of the making of the contract with aspelles, aspellant had entered into a contract with the Joliet Warehouse & gransfer Company at Joliet, Illinois, by the terms of which a pellant was to ship its goods to such transfer company bundled and packed ready for reshipment, and such goods were to be shipped out by such transfer company upon the orders of appellent or its agenta Appellant also by letter authorized appellee about the middle of the summer of 1910, (the season to which the contract applied,) to send in his orders direct to the transfer company for any further machines desired under the contract so that the same might be filled more promptly. By the stipulation of facts it has been agreed that the amount due unter said contract is \$46.00, with interes thereon at six per cent. From October 1, 1910, and that the same has not been paid. The issue in the case have therefore been narrowed down to two points, first, whether a pellant was doing business in Illinois within the meaning of the statute, and second, whether it was engaged in interstate commerce. At the hearing, appellant submitted five propositions of law, all of which were marked "refused" by the court, and to these pro-

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Prior to the time of the making of the dunit of with ed. All: togathor a cital bareine had justleges , welleges Jolist Marshouse & granefer Congany at Jolist, Illinois, by the terms of which a cellant was to ship its wools to such transfer company hundled and packed ready for rashipment, and auch goods were to be shilled out by ouch tine; asi to inelie in to enemto eds money yearmon releasti t pellant also by letter exthorized entire more the middle of the number of 1919. (the cannon to which the ent of test it exesses whi in home of , building tourings transfer company for any further anothers desired when -turner arom reality at the a man sait tanks on tourtains and By the stipulation of space to halfeen surjuste and ya the amount due under said contract is 161,00, 10h viert dudo har , il. il redetio mar' . smee requie de moe The Local to the order the same has not been said. have therefore been an ordered form to the policie, it is what a pellint of the product of dralleg a redredu the meaning of the stability, and sound, when y's an 1.27 1.6 1 6.1 engaged in interstate commerce. file to in . . I he envidenced syll bettinden incling of ware a ser of any large source sail mo "benefer" besitan ersa

positions of law as they were ,arked and filed, was attached a statement of the court which contained its findings in the case. Juigment was rendered against appellent for a osts.

The appellant relies upon the following points for a reversal of the judgment of the court below:— (1) The court erred in its construction of the critten stipulation of facts. (2) The finding of the court was equinst the evidence. (3) The court erred in finding that the business of appellee as the same was transacted in the state of Illinois, was not interst to commerce. (4) The court erred in marking the proposition of law submitted by appellant "refused." (5) The court erred in rendering judgment against apprllant.

The court refused the proposition of law on the round they were not based on the stipulation of facts as he unierstood them. We are of the opinion that the court misconstrued the stipulation and misconstrued the contractbetween appellant and the warehouse company.

The language of the stipulation is conclusive. Where it says that goods were shipped by the trunsfer company to purchasers in Illinois it says "such purchasers" and that refers to the purchasers referred to in the first part of the sentence, and that is purchasers whose contracts had been acted upon by appellant at its home office in Ohio; and it is only such purchasers whose contracts had been approved at the home office in Ohio who may order

positions of law as they were parked and filted, and attached a distenset of the court which contained its findings in the case. Judgment was rendered against appealent for a cots.

The appellant relies upon the following prints for a veveral of the judgment of the court below: (1) The court erred in its construct on of the existen attituation of facts. (2) The finding of the court was a rained the evidence. (3) The court arred in finding that the business of appelles as the was one transacted in the etate of Illinois, was not interest to conserce. (4) The court erred in sacistic the court erred in sacistic by appellant "refused." (5) The court erred in rendering judgment arranged.

The court refused the proposition of 11s of the ground they were not based on the stipulation of them. It are of the opinion it is the court at seconstrued them. Its are of the opinion it is the court at seconstrued the etipulation and wisconstrued the contractbetoes at a slight and the exactnust courtary.

Contractbetoes at a slight at the exactnust courtary it says the ground the framework in this case ships of by the framework in this case in Miliacia it says "east, treis orapany it that refers to the curshment as it is it is it. I want of the sentence, each that is parchased to its in the fact of the sentence, each that is parchased to the courtary and the host or the courtary and it is only and president to the face and president to the courtary and the host of the courtary and it is only and president to the courtary and the host of the courtary and the host of the courtary of the face and president to this and of the face and president of the courtary and the host of the other or the face and the face of the face of

direct from the trandfer company.

The contract between appellant and appelles shows aspellee did not order a specific number of machines, after the first three, but that he was to order from a certain schudule such machines as he might wish. The misinterpretation of the language of the contract with the warshouse company was that the court inferred that a traveling arent of appellant selling goods in Illonois, might order goods shipped from the transfer company instead of sending the contract first to the meneral office in Ohio for apprival. This is a misinterpretation of the contract with the transfer company when considered in connection with the stipulation of the agreed facts which is that all of the goods sold in Illinois were to he muon orders approved by appellant in Ohio. In other words, after the contract had been made and approved in Ohio, the agent might order goods from the transfer company to fill that contract instead of from appellant in Ohio.

the contracts between a pellant and a pellas, and between appellant and the transfer company, that it never intended that the transfer company, or its shipping agent in Illinois, could complete any contract between the purchaser and appellant, but the quest on of price to be paid and the responsibility of the purchaser had to be passed upon at appellant's home office. In other words the order the but

direct from the tr miler company.

The control between Argellary and agrains share repelled did not order a specific number of anchine, after minime three three, but that he was to order from a dertain schuduls such machines as he mi ht sish, The misinterpretation of the language of the contract with the warequilevent a fadt hemalai faute ent fadt som yasqmoo saved arent of appellant selling roots in Thionois, milto order. miles. In head of course telepool all most happles about the contract first to the memeral office in Ohio the apprival. This is a misinterpretate on of the contract with the transfer company when commissed in commentia this of delive steal becars and he no talputte and dain state no no ser of area cloudill of blos shoop eds to lis and the world of the color of t the contract had been sade and our cover a Obic, i'v armi airly order goods are transfer company to fill the sontract instead of from ... wellent is Onto.

We think it is close the seignizion of rethe contracte between a pelient and a pelien, and set, ear
appellant and the transfer company, show to never intended
that the transfer company, or its allipping est in
Thinois, could complete any centrest between his surely est
and appellant, but the parentest on effects to be selected to
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seponsibility of the parentest hid to be an east on the

a proposition until accepted at the home office, and then it became a contract.

The business did not contemplate that the contract was to be filled immediately, but the purchaser was to ask for his goods at such times as he canted them, and while ordinarily his request that he wanted certain machines and his contract would be sent to the home office and the home office would then order the goods shipped from the transfer company in Joliet, yet, if there was haste, its agent in this state could direct the transfer company to send on the machine or machines, not is a new agle but in carrying out and filling orders which had previously been accepted and approved at the home office of appellant.

The law governing this question is laid down in Havens & Geddes Co. v. Diamond et al, 93 ATIL. App. 557; wamilton wachine Tool Co. v, Machanie's Machine Co., 179 Ill. App. 145 and cases therein cited.

We are of the opinion that having a warehouse in Illinois from which its goods were shipped, did not constitute a doing of business in this state within the meaning of our statute and the decisions of our courts; therefore, the argellant was entitled to recover, and the refused propositions of law should have been held. The judgment is therefore reversed.

The judgment is therefore reversed.

Judgment here.

Osgood v. Skinner, 186 III. 491, the amount of principal due and the rate of interest under the contract are stipulted. We have power to compute the interest. The amount now due is \$56. Judgment is here rendered in favor of the Thomas Hanufacturing Company against Christ phade, Jr. for \$56. and cotst, with order for execution.

a proposition until accepted at the rows office, and then it became a centract.

The business did not contemplate that the contract was to be filled immediately, but the gurcheser as to ack for his goods at such times as he canted them, and while ordinarily his request that he wanted destain and the and his contract would be sent to the home office and the home office would then order the goods shipped from the transfer company in Joliet, yet, if there are heate, its egant in this state could direct the transfer company to send on the machine or machines, not as a new eight but in carrying out and filling orders which his previously seen accepted and approved at the home effice of a pariously seen accepted and approved at the home effice of a pallant.

The law governing this question is leid down in Morena Ageddee Co. v. Diamond at al, SIAIII. (pr. 557) wantiton within Tecl Co. v. Mechanic's pachine Ci., 178 Ill. App. 145 and cases therein circl.

We are if the orinion that having a stream to in Tllinois from which its goods were shirped, did not constitute a daing of business in this state at thin the meaning of our statute and the lesisians of our origing therefore, the sargellant was satisfied to recover, its instrused propositions of law should have been hald.

The judgment is therefore reversed,

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Osgood v. Skinner, 186 Ill. 401, the saunthof presipandue and the rate of interest unter outract are estimated.

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Rapufacturing Gammany against Christ phase, Jr. 123.

STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 1851.A. 268

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5831

Roger C. Sullivan,

Plaintiff in Error.

Illinois Publishing and Printing Company, a Corporation,

Defendant in Error,

Error to Paoria,

186 LA. 268

Opinion by CARNES, J.

Plaintiff in Error Roger C. Sullivan, brought an acttion of libel against the defendant in error Illinois Publishing & Printing Company, a corporation and William Randolph Hearst and Andrew M. Lawrence. The individual
defendants were not found service was had usen an agent of
the defendant corporation and an amended declaration was
filed to which a demurrer was sustained fillowed by judgment for the defendant.

The amended declaration omitting the title read:

"Now comes the plaintiff, Rodger C. Sullivan, by his
undersigned attorneys, and complains of William Randolph
Hearst, Andrew M. Lawrence and Illinois Printing and
publishing Company (a corporation), the defendants here,
of a plea of trespass on the case.

For that whereas the plaintiff, before and at the time of the committing by the defendants of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the satesmand good opinion of his neighbors and other worthy citians of the State;— This plaintiff avers that on to-sit, June 1st, 1909 one William Lorimer was declared elected to

n. 3951

wer C. Sullivan,

Plaintiff in Error.

In the Publishing and Printing

Defendant in Error.

Stock to Tending

186 I.A. 268

Opinion by CARNES, J.

tion of libel against the defendent in error lilinois PubLining Finding Contact, Contact The individual
Lining Hearst and Andrew M. Lawrence. The individual
Lining Were not found service was had uson an erent of
Line to which a demurrer was
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And have and reputation, and deservedly enjoyed the satern good opinion of his neighbors and other worthy sitiates of the State;— This plaintiff avers that on te-wit, no let, 1909 one William Lorimer was declared sleeted to

the office of United States Sanator from the State of Illinois, by the General Assembly of the said State, and on to-wit, the first day of May, 1811, the Senate of the United States, by a certain committee of its members, was investigating the legality of the said election of the said William Lorimer, the said committee was on to-wit, June 36th, 1911, and as well before and after that date concucting its said investigation of said election of said William Lorimer in the city of Chicago, Illinois, Amongst the matters and things alleged, in support of the alleged illegality of the said election of said William Lorimer, to said office, it was charged that he secured his such election by and with the votes of members of said general assembly who belonged to the Democratic party, and that certain of the votes of such members, who then voted for said William Lorimer, for said office, we are purchased, to-wit, that the persons casting the same, had been sorruptly induced by the payment to them of money, to then and there vote for said William Lorimer for said office, and that to secure, and pay for said votes, a large fund, to-wit, One hundred thousand dollars, had been usis ad by some persons, and thereafter distributed to some of the members of said General Assembly, who so voted for said William Lorimer for said office as pay, to-wit, as a reward for their having so voted for said Loriner for said The said committee of the said Senate, was then and there investigated the alleged participation of one Edward Hines, of Chicago, Illinois, in the raising and collecting of said alleged corruption fund,

the office of united States Senator from the State of Illinois, by the General Assembly of the said State, and on to-wit, the first day of May, 1911, the Senate of the United States, by a dertain committee of its members, was investigating the legality of the said election of the .tiw-ot no saw estimmoo biss edt . remiro, mailliw bise June 26th, 1911, and se well before and after that date bise to noticele hime to noticalizational bise att anticuonos William Lorimer in the city of Ohicego, Tilincia, Amorgan the unttern and things alleged, in support of the mailliw bise to noitoele bise out to willegelli begellam Loriner, to said office, it was charged that he secured his min election by and with the votes of members of said peneral assembly who relocant to the Demonstic nerty, and Mat certain of the votes of such members, who then voted for said William Lorimer, for said office, were purchasied, to-Tit, that the persons casting the came, had been corrent of , yearon to ment to them of money, to them and rooms you for said williss borness you said offices. that to secure, and pay for said votes, a large fund, to wist need bad , exalloh hasewort berhaud and , thwood by some persons, and thereafter distributed to some of the members of said General Assembly, who so veted for said William Lorimer for said office se pay, to-wit, as a rebise tol raminal bise not befor on privad rieds not b The said committee of the said Senate, was office. Disc and there breezing the wife participation and of one Howard Wines, of disease, listnose, to see raising and scrincting of said allaged horrowing fact,

and was then and there seeking to ascertain who, if anyons, had contributed to said alleged fund, or to-wit, had been requested to contribute thereto, or to-wit requested to contribute to a fund out of which to reimburse, in part, those who had rained, and as alleged, expended maid original fund, for such alleged unlawful purpose.

This plaintiff upon and at all times after ganuary 1st, 1909 and for many years prior thereto, had been and was, a member of the Democratic party, and a recident of the City of Chicago, Illinois, The said William Lorimer upon, since and prior to January 1st, 1909 was and had been a member of the Republican aprty and a resident of the City of Chicago, Illinois, Then and there, at said investigation by said committee on to-wit June 35th, 1911, one H. H. Kohlsaat, of Chicago, Illinois, was a witness and testified as it is alleged, that one Clarance 9. Funk of said City, had reported to him the said Kohlsaat that the said Edward Hines had solicited him, the said Clarence S. Funk, to secure from a certain corporation with which he, the said Clarence S. Funk, was associated, the sum of Ten thousand dollars, to be used in part to reimburse those who had raised and used, for the purposes aforesaid, said alleged original fund of One hundred Thousand dollars, and that said Clarence S. Funk, had told him, the said Kohlsaat, that others swide fro the above referred to corporation with which said Gluzance S. Funk was associated were to be asked to make contributions of maney to reimburse those who had raised said alleged original fund of One Hundred Thousand dollars, and that

and was then and there seeking to ascertain who, if anyone, and contributed to said alleged fund, or to-wit, had been requested to contribute thereto, or to-wit requested to contribute to a fund out of which to reimbures, in part, those who had rained, and as alleged, expended sair original fund, for such alleged unlawful purpose.

This plaintiff woon and at all times affer rangary 1st, 1909 and for many years prior thereto, had been and as, a member of the Democratic party, and a resident of The exit William Lordee City of Chicago, Illinois, had hes saw COSI , tel grauer to roing bas sont and had legn a member of the Republican aprity and a resident of City of Chicago, Tlinois, Them and there, at eaid investigation by eaid committee on to-wit June Sath, -tiv a eaw , atentill , onsoid to , tasaiden . H . H eno 111 ness and testified as it is alleged, that one Clausnes T. taselfich bias sit mid of betroger bed , vilo bise to and bine said , mid bedicitoe had seniH brewhl bise edt J . Clarence S. Funk, to secure from a certain corporation with which he, the said Clarence S. Funk, was associated, is sum of Yen thousand dollars, to be used in part to serouse those who had reised and used, for the purposes betieve and he hard lastyles begalle blas | blasstole Thousand dollars , and that said Clarence R. Funk, had bld him, the said Mohleset, that others and and blo bove referred to corporation with which said Clarence S. Funk was associated were to be asked to make northeticutions barells blue heater had odw scodt as medmier of yenom to original fund of One Hundred Thousand dollars, and that

said Clarence S. Funk had mentioned to him, the said Mohleast, the names of Edward Tilden, of Chicago, Illinois, and this plaintiff, as being of those who to-wit had contributed money to make up said alleged original fund of One mundred thousand dollars, or to-wit, who were to be asked to contribute money to reimburse those who had contributed to said alleged original fund . The three persons next named and hereinafter referred to, to-wit, Senator John Broderick and Senator D. W. Holtslaw and John J. Woloughlin were each members of the General Assembly aforesaid, and belonged to the Democratic party, each voted for the said alection of said William Lorimer to the office of United States Senator. One of the members them and there as aforesaid, of the aforesaid committee of said United States Senate, hereinafter mentioned, was John W. Kern of Indiana. The said committee was then and there investigating to-wit, whether or not the said election of said William Lorimer was illegal and to-wit, was the result of, to-wit, a corrupt combination of members of the said General Assembly, to-wit, a bipartisan agreement of members thereof, soms of whom weers members of the Republican party, and whom were members of the Democratic party. Before said committee then and there, there was given evidence that certain persons named Wayarhaeus ar, to-wit, certain corporations owned or controlled by certain persons named Neyerhaeuser were interested in the maid election of maid William Lorimer, and desired to have said William Lorimer elected to said office; and that the said Diward Himes was

Clarence S. Funk had mentioned to him, the said inleast, the names of Hdward Tilden, of Chieses, Illinois, -nos bad throst odw seous to muse as, filinialg sidt -ent to hart lanighte begalle bise or same of venom betw = perise ed of eraw other, or to-wit, who were to be asked to contribute money to reimburse those who had contributed No each ableged orthing free! The three persons next of d and hereinafter referred to, to-wit, Senator John nick and Senator D. W. Holtelwe and John J. Mahou him stds , brancots offeness favored any to exempt shore atomics and belonged to the Democratic party, each voted for the said Lection of said William Lorimer to the office of United Lates Senutor. One of the members than and thora as setsia beding him a to settimmoo bissaroke oit to bissaroke Lunel he much . W mood was beneficer wethered . Herm of Indiana. The said committee was then and there investigating to-wit, neminal mediate bise to motionis bise ent ton to this in we likely the to-ett, we had been it, me-th, a faranab hise add to aradman to notionitmos for too A cell, towert, a bipartiesa agreement of members thereof, MAN OF THE ASSESSMENT BUT THE WARRING WAS IT SOME TO ARREST ... were members of the Democratte party. Line emples that spashire nevil saw easit has neat estitume certain persons nemed Leverhaude or, to-dis, certain bonner wasers a district ye bellevines to beave anotherogree Dist is noticely him and an harested arew recosinger William Loriner, and deaded to have said William gowiner sleeted to said office; and that the said Parar Mines was

intimate with to-wit, said corporations, and to-wit, with said Weyerhaeuser. The said committee was then and there investigating also whether or not said Edward Hinse or said Weyerhaeusers or to-wit said corporations in which said Weyerhaeusers were interested had contributed any oney to corrupt members of the said General Assembly to vote for said William Lorimer for said office or had contributed any money to advance the candidacy of said William Lorimer for said office.

The plaintiff avere that on to-wit, June 26th, 1911, the defendants, William Randolph wearst, Andrew M. Lawrence and the Illinois publishing & Printing Company (a corporation) were engaged in the business of editing, printing and publishing a certain newspaper in the city of Chicago, called and named, to-wit, Chicago Examiner, to-wit, The Twentieth Century Newspaper, to-wit, Chicago Examiner, The Twentieth Century Newspaper, which said newspaper then and there was circulated and sold in the counties of Cook, Peoria and all other counties of the state of Illinois, and generally circulated and sold throughout the entire United States.

This plaintiff avers further that the said defenlants, on to-wit, June 76th, 1911, did, then and there, wickedly and maliciously, intending thereby to bring this plaintiff into public scandal and disgrace, wickedly and maliciously compose, print and publish, and cause to be composed, printed and published in said newspaper, to-wit, Chicago Examiner, to-wit, The Twentieth Century Newspaper, intimate with to-wit, said corporations, and to-wit, with

cald Meyerhaeuser. The said committee was then and

not be said to the said committee was then and

call of the said willism Loriner for said office or had contri
ansed un long to dance the middless of had contri
course or said office.

The plaintiff evers that on to-wit, June 28th, 1811, and the content of the company (a company the Illinois publishing & Printing Company (a company to make the content of the content of

chedly and meliciously, intending thereing to bring this
plaintiff into public scandal and disgrace, wickedly and
liciously compose, print and publish, and cause to be
composed, printed and published in said newspaper, to-vit,
Chicago Examiner, to-wit, The Twentieth Century Newspaper,

to-wit, Chicago Examiner, The Twentieth Century Nevspaper, a certain false, scandalous and malicious libel, or and concerning this plaintiff, which libel contains the false scandalous, malicious, defamatory matter following, of and concerning this plaintiff, that is to say:-

Roger Sullivan must tell how he 'delivered' Democrats to Lorimer.

Three questions for the U. S. Senate Committee to ask Roger C. Sullivan | 1- Why did you telephone

Richard Egan of Springfield to find bondsmen for State

Senator John Broderick who was indicted for bribing Senate or Holstlaw to vote for Lorimer?

2- Why did your henchman, John J. McLaughlin telephone, 'We will find plenty of Lawyers for Broderick'

3- Whom did 'Bose' McLaughlin mean by we ?

Former Democratic 'Boss' to be questioned on years of corruption in Illinois, and on deal by which he helped send Republican to Senate.

to-wit, Chicago Imaminer, The Twentieth Century Hermpaper, a certain false, scandalous and malicious libel, of and concerning this plaintiff, which libel contains the false, one concerning this plaintiff, that is to say:

Percert Sullivan was tall how he limitered!

Democrate to Lorimer.

Three questions of the state of

2- Why did your henchman, John J. Melaughlin

3- Whom did 'Bose' Mohaughlin menn by we ?

Torage equation (Hown) so he questions of properties of its properties of the contract of the

Senator John W. Kern of Indiana - What is 'Isrimarian'?

H. H. Kohlesat, Editor and Publisher of the Chicago

Heoord Herald - 'Lorimerian' is the affiliation, oc-apsiation and cohesion of Democrats and Republicans for party

Li nd or no.

His (Lorimer's) affiliations have always been with our

party or the other. He has been elected to office a good

many times by Democratic votes as well as by Republican

votes !-

From the stenographic report of the proceedings before the committee of the United States Senate investigating the election of William Lorimer: testimony taken Saturday.

With the foregoing testimony by Mr. Kohlsaat before the Senatorial investigating committee on Saturday and with the latter mention by the same gentleman of the name of Roger C. Sullivan of Illinois, the way has been opened for a full exposure of what really constitutes 'Lorimerism' by the investigators.

Viewed from any angle, the conclusion, remembering the testimony that already has been given before the committee, is almost inevitable that the committee of United States Senators forming the Lorimer inquisitorial body must call Roger C. Sullivan, and must ask of him many pertinent questions regarding his connection with bipartisan Illinois politics for a number of years past.

The mention of Roger C. Sullivan's name by Editor

Kohlsaat care about in this wise; Mr. Kohlsaat and told

to the committee the story of his conversation with

C. S. Funk, General Manager of the International Harvester

Company, substantially as he had given his testimony

before the Helm investigating committee in Springfield.

He had told of Funk's story of his (Funk's) conversate

ion with Edward Hines; of Hine's request for a contribution

of \$10000 from the Harvester Company to reinburse the

coterie of men who had 'underwritten' the Lorimer

election to the Senate at a reputed cost of \$100000.

From the stenographic report of the proceedings before the

With the foregoing testimony by Mr. Mohlesst before

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election to the Senate at a reputed cost of \$100000.

Editor Kohleast was asked if any other names were mentioned to him by Funk at that time in addition to the name of Edward Tilden, Mr. Kohleast finally answered: 'One of the names was Roger C. Sullivan, who is percentic national committeeman from Illinois, and very influential in Democratic politics'. With these words of Mr. Kohleast's the name of the former Democratic 'boss' of Illinois was first brought definitely and finally into the Lorimer investigation.

The part that Roger Sullivan played in the election of Lorimer to the Senate is well understood in Illinois. It was the henchmen of the then 'boss', Democratic members of the Illinois Legislature, whose votes made possible the election of Lorimer. Sullivan is given the credit by all who knew anything about Illinois politics of having put the malodorous Lorimer deal through. (Meaning that this plaintiff had participated in bribing members of the general Assembly of the State of Illinois to vote for William Lorimer for the office of United States Senator.) There is abundant evidence as will be shown now and later that this is true. I Meaning that this plaintiff contributed money which was used to buy the votes of nembers of the General Assembly for William Loriner for the office of United States Senator, to-wit, that is, plaintiff was guilty of the crime of bribery.

For instance, the Senatorial Investigating Committees should call Sullivan as a witness and demand of him an explanation of the following series of incidents: Then

Editor Mohleant was asked if any other masses were mentioned to him by Funk at that time in addition to the mass of Edward Tilden, Mr. Mohleant finally answered: 'One of in more was Mager C. Amilleen, the is perceruite mational of the eman from Illinois, and very influential in Deace the politics'. With these words of Mr. Mohleant's land mass of the former Deacersise Those; of Illinois.

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"For instance, the Manaterial Enverticating Cosmittees

| ould call Sullivan as a witner; and terand of him to
explanation of the Mollowing saries of incidents: When

the Senatorial deadlock was on in Springfield in the winter and spring of 1909, Albert J. Hopkins, then United States Senator from Illinois, needed seventeen votes to win a re-election. It was reported that these votes could be bought for \$2000 each. One night, according to reports that already have been published, Fred M. Blount, former president of the Illinois Surety Company, a Hopkins organization, one of the chief supporters of Hopkins, and manager of his campaign, arrived in Springfield. With him he had a small yellow satchel, in which there was supposed to be \$34000. Blount, still according to the stories, had no sooner alighted from the train than he was confronted by a number of well known Lorimer men.

'Nothing doing', the porimer men told Blount 'Go back home and take your little satchel with you. Don't open it up here. If you do, you'll get into trouble.' The satchel was not opened. That same evening, in the St. wicholas Hotel in Springfield, Roger C. Sullivan called a meeting of his Chicago members of the State Legislature and the down-state members of the Democratic party whom he controlled. To the men assembled, Sullivan said: 'I know that there is a plot on to push over a Republican. I want to tell you something. If any one of you fellows casts his vote for a Republican for United States Senator I'll have him read out of the Democratic party in Illinois.' Three months or so later the votes of these Democrats were cast for William Lorimer, a

the Senatoriel deadlesk was on in Syriariteld in the winter and spring of 1909, Albert J. Hopkins, then United States and spring of 1909, Albert J. Hopkins, then votes to win a selection. It was reported that these rotes could not for \$5000 anch. One might, according to reported in the first one of the Clinois Surety Company, a Hopkins or the action, one of the chief supporters of Hopkins, and managed in this campaign, arrived in Springfield. With him a small yellow extend, in which there was suppressed as no har of rell known porture men such there was suppressed as no har of rell known porture men.

Nothing deing!, the parimer was told Dannt 'Go 'mathod end take our little satched with you. Bonts open it up If you do, you'll get into trouble.! The same not opened. That same evening, in the St. and lie Hotel in Springfield, Roger C. Sulliven called a mastin of his Chicago members of the State Legislature and the down-state members of the Democratic party when he was that there is a plot on to push over a Republicen.

I want to tell you something. If any one of your fallows caste his vote for a Republicen. States Senator I'll have him read out of the Democratic party in Illinois.' Three members or so later the voter of these senator I'll have him read out of the Democratic party in Illinois.' Three months or so later the voter of these Democratic party in Illinois.'

Republican, for the Senate.
Warning issues by Shurtleff.

Is it not the duty of the Senatorial committee to call
Roger C. Sullivan and demand of him an explanation of this
circumstance to ask him why? (Meaning that this plaintiff
knew of the fact that members of the General Assembly had been
bribed to vote for said William Loriner for the office of
United States Senator, and that he had participated in
such bribery.)

Again: The next day after this occurence Speaker

Shurtleff arose at the joint assemblage of the Lagislature, and in ringing tones, said: 'I understand and
am credibly informed that there is a movement on foot here
to secure the votes of seventeen Damoeratic members of this
Legislature for a Republican for United States Senator.

I want to say that the first Democratic who casts his
vote for a Republican I will expose from the platform
of the house, and I will name the other states in in the
plot at the same time.

For the first time in all that long deadlock Speaker Shurtleff on that day reversed the usual order of things, and ordered the roll of the House to be called first, instead of the Senate.

Shurtleff voted for Lorimer.

A few months later the seventeen members of the Democratic party, and move too, and Speaker Shurtleff himself a Republican, voted for Lorimer.

Regublican, for the Senate. Warning issues by Shurtleff.

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There is still more evidence that the Investigating Committee might very properly sak Romen C. Calliyan to explain. State Senator John Broderick, a notorious Sullivan henchman , always at the beck and call of Sullivan, was indicted by a grand judy in Sanganon County, and was charged with having given State Senutor D. T. Holstlaw a bribe of \$2500 to vote for the election of Lorimer. Lat the investigating committee of the United States Senate call Roger Sullivan to the witness stand, put hit on outh, and ask him why it was that Sullivan, hearing of the indictment of Broderick, called Richard Lyan, a Springfield liveryman, on the telephone from Chicago, and said in substance: 'John Broderick is in trouble over this Lorimer mess. He has been indicted. I want you to be ready to go his bail. Get some one else to go on the bond with you. 8 (Meaning that this plaintiff linew soil Broderick had been guilty of bribery in relation to the election of William Lorimer to the office of United States Senator.

Egan on Broderick's bond.

Egan is said to have replied, ' I'LL get my brother -

The Senate investigating committee should ask Sullivan the newson for this. (Heaning that this plaintiff had knowledge, and if interrogated by said committee, could show that members of the said committee, but been had bribed to vote for William Lorimer for the office of United States Senator.)

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Egan on proderiouts bend.

⁻ radford v.: t-n LLT ! . halfiger evad of hise at may

in-law Ben Kirlin to go on with me. And he did.

Why, let the committee ask, was Sullivan so interested in the case of John Broderick ?

Here is something else that the Investigating Committee might ask Roger C. Sullivan, when it calls him and witness in the Lorimer case. 'Tom' Dawson, a Chicago lawyer and former State Senator, following the indictments of the Democratic members of the legislature in Sangamon county, went to Springfield to represent all of the Democratic members who had got into trouble. -t might be interesting to ask Mr. Sullivan who it was that sent Dawson to Springfield on this errand. (Meaning this plaintiff had engaged an attorney to defend and protect those charged with bribery in relation to the election of William Lorinar to the office of United States Senator for the reason that this plaintiff had himself participated in such bribery and frared exposure by those so bribed if he did not assist in defending them against criminal prosecution for participating in such bridery. Dawson was, and is, a Sullivan man in politics. had been a State Senator, and was supposted to know the ropes. John proderick had furnished bail as arranged by Sullivan, Dawson called 'Boss' John J. Mc Laughlin, another Sullivanite, on the telephone, and said 'Pat O'Donnell (Attorney Patrick H. O'Donnell of Chicago) tells me to send Broderick to St. Louis, so he won't talk too much. Broderick kicks on going

--law Ben Kirlin to yo on with me.' And he did.

Why, let the committee cak, was Sullivan so interest-

Have is something else that the Investigating Come-Altre might sei Roger C. Fallivan, when it calls him as a I the Leringr ones. 'Tom' Dayson, a Chicago wyer and former State Senator; following the indictments he Deriocratic members of the legislature in Conganon ent to fin the eggs of blaitphings of thew ,y woo tigim of . sldwort ofni tog had one predmem phisosoc - De interesting to ask lir. Sulliven who it was that sent Therean to Analogical in this comment of Manufacture this tooser, has beeled of generals at depugae bed flit those charged with bribary in relation to the election of William Lorimer to the office of United System Can how -isiting Riemaid had filtriair plaint in himself particisa sacit ye emmenge harast has yelder inom toniage med painwels in beleading them against inal prosecution for participating in such bribery. on was, and is, a Sullivan com in wellting. word of Ledmongra our lan , wotaus state a asso is e . Mai ledelauri had dolrehore adol . segor e Langed by Sullivan. Dowcom called 'Bous' John J. Me Laughlin, another Sullivanite, on the telephone, i said Fat O'Ronnell (itterary Patrick H. O'Bonnell Shieago) tells me to send Broderick to St. Bouis, to St. Louis; says he won't go to St. Louis; says he is going back to Chicago. What shall we do with him ?!

Told to ignore O'Donnell.

Boss! McLaughlin answered Dawson as follows: Lat Broderick do whatever he wants to. Don't pay any attention to Pat O'Donnell. We can hire all the lawyers we want. Send him back here if he want to come. The Investigating Committee has the right to ask Roger C. Sullivan about this circumstance, and ask him to explain who is meant by 'we'. There are many other things in connection with Sullivan's bi-partisan connection with Illinois politics that might very properly be inquired into. The Senatorial Investigating Committee is a law unto itself. It is responsible only to the United States Senate. It is bound by no hard and fast rules of swidence. It can - and has been - hearing evidence that throws a light on the election of Lorimer, and that at the same time has no direct bearing on the subject of corruptive influences that are said to have encompassed the election of Lorimer.

Widest latitude in testimony.

The testimony already given by Editor Hinman of the Chicago Inter-Ocean; Editor Mohlsast of the Chicago-Record-Herald; Cyrus H. McCormick, President of the International Harvester Company; Edgar A. Bancroft, General Counsel of the International Harvester Company; former United States Senator Albert J. Hopkins; former Covernor Richard Yates - the testimony given by these men in response to the questions put to them, shows conclusively that the present committee, unlike the former

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testimony. The bars have been thrown down. With this in mind, it is plain to see why the calling of Roger C.

Sullivan and a grilling of the former Democratic bosc not only on the porimer election, but also on matters of relinois and Chicago bi-partisan politics in reneral is in order. Roger C. Sullivan's corporation efficiency are well known. Roger C. Sullivan's double dealing in the politics of his state and city is well known. A little more than four years ago Sullivan three his attempth from Edward F. Dunne to Fred A. Busse in the mayorality campaign. Busse, a corporation man as strong as Dunne was at that time anti corporation, was elected by the sid of the pemocratic votes thrown by Sullivan. Why?

After Lorimer's election to the Senate Sullivan's etrength was thrown for Lorimer's man, William J. Mowley, for the lower house of Congress in the Lorimer district.

Edmond J. Stack was the regular namocratic mamines;

Dr. Carl parnes was the nomines of the Independent

Republicans. Moxley was elected by the aid of Sullivan votes. Was this a part of the deal by which Lorimer secured his election to the United States Senate?

That the district is Democratic is evidenced by the election of Stack, Sullivan having been erased as a power in politics.

These are only a few of the circumstances into which the Senatorial Committee might well inquire.

nities, is going to allow the widest lettings in the remains of the former Decounties and a grilling of the former Decounties and Incept of the former Decounties and Chicago bi-partisen politics in general is in call answer.

The sette and city is well known. A little of his state and city is well known. A little of then four years ago Sullivan three his attempts and the negronality was at that time anti corporation, was alsotal by the second to the second to your states.

After Loriner's election to the Senate Smillyan's strength was thrown for Lorimer's man, William J. Horley, in the same of the same of the Independent Dr. Carl garnes was the nomines of the Independent Republicans. Moxley was elected by the Lind States Parks of the Chief States Senate Secured his election to the United States Senate ? That the district is Democratic is evidence? In the election of Stack, Smillyan having been eraser in the in politics.

These are only a few of the directiones incomition the Senatorial Committee withit well impulates.

And further said defendants did then and there, in the same newspaper, draw, construct, print, publish and circulate a certain cartoon, intending to represent this plaintiff and said William Lorimer, and in to-wit Ten thousand copies of said papers, did cause to be printed over said cartoon, the following: 'Senate after hi-parti-Weyerhaeusers also to be called. (san secrets. The said cartoon shows two men, one bearing a tan marked Lorimer (meaning that the person so marked was intended to represent and depict said William Lorimer), and the other of said men bore a tag marked Sullivan (meaning that the person so marked was intended to represent and depict this plaintiff). Both of said men are there represented and shown to be standing - subracing such other, back of what is intended to represent a ballot box, and such is shown in the act of depositing a ballot in asid box, which ballots are marked as follows, to-wit: The one represented as being cast by the figure nurked, to-wit, tag, norimer is marked vote for Gullivan; the cen pepresented as being cast by the figure, marked, to-wit, tag, Sullivan, is marked, vote for Lorimer. Above said figure in said cartoon appears the word PALS -: In and by said cartoon the said defendants, then and there, falsely, maliciously and wilfully intended to say, and did falsely say and charge that this defendant cust his vote to-vit his ballot, at public elections in favor of candidates for public office supported by anid William

And further said defendants did then and there, in the same newspaper, draw, construct, print, publish and sind Joseph of Thirther and Thomas and The Contract Line per the-er of his , morrel mility blue has introduced beining of or ease, did cause to be printed aver and esewoon, the followings ! Secale after slepantle-. n secreta. Waverhasusers also to be called.! The said our took above two said, one banking a tag notice of Lenimer (meaning that the person so marked was intended tento sat bas (region said William borner), and the other of said men bore a teg marked Sallivan (meaning that the Palest has Impress of Johnstol are below as making this plaintiff), Both of each men are there represented and shown to be standing - embracing each other, back of what is intended to represent a ballot box, and each is whom in the act of depositing a ballot in said box, which ballots are marked as follows, to-wit: The one Part of the state of the figure cares, the first and the f betmanery one and amartillar non stoy beduen al' remitte we within good by the right, sample, however, sec. biss avoda Sullivan, is marked, vote for Loriner. figure in said cartoon appears the word PALS -: In and by said cortoon the said defendence, then and there, felsely, miltolouely and wilfully intended to may, and sid fand thebasish sids that apredo bak you yleaful bib vota to-wit his ballot, at public elections in favor o: candidates for public office supported by said Villian

Lorrimer and his political associates, and that this plaintiff used his influence with his political friends and political associates to cause them to vote for those condidates for public office, whose election was favored by said William Lorimer. This charge is false, the defendants knew it to be false and untrue, and knowing it to be false did wilfully and religiously wint an applicable said cartoon.

This defendant did not favor the election of Fred A. Busse as mayor of Chloago against Edmand F. Lunne, not advocate the candidacy of said Fred A. Busse, This charge is false. The defendants knew it was false.

They, then and there, wilfully and maliciously published and circulated such charge as accressid, knowing it was false and untrue.

This defendant did not aid in the election of William T. Moxley as Congresamen over Edmund J. Stack. This charge is false. The defendants then and there knew it was false. The defendants, knowing such charge to be false, did wilfully and meliciously publish and circulate the same as aforesaid.

This defendant did not contribute any money to any fund to be used in any manner to bring about the election of William Lorimer to the office of United States Senator aforesaid. This defendant did not assist, directly or indirectly, in creating, exertifing or ratifying the

Lorrimer and his political esceptions, and that this plaintiff used his influence with his political friends to didates for public office, whose election was favored by said William Lorimer.

This charge is fulse, the said carteon.

to see as mayor of Chicago against Ednard F. Dunns, nor advocate the candidacy of said Fred A. Russe. This charps is false. The defendants knew it was false.

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This charge is feles. The weferdants that there
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This defending its not convainte any that it ing fund to be need in any manager to bring about the election of William Loriner to the crite of United Street Tention aforesaid. This defendant alia not preter, threetly are actionally are actionally to recipy or retifying the continuous of retifying the

gathering of any fund to aid in bringing about the election of said William Lorimer to the office of United States
Senator aforesaid, nor in creating any rund to reinburse
any persons who may have gethered a fund for much purpose.

This defendant did not bribe, directly nor indirectly, any person or persons ambers of the general Assembly of said State to vote for, to-wit, to aid or advance the election of William Lorimer, to the office of United States Senator aforesaid, nor to-wit, to cause others to favor his such election, or to-wit to vote in said General Assembly for his election to said office all United States Senator. This defendant did not advise, nor solicit any member of said general Assembly to vote to elect said William Lorimer to said office.

These charges and each of them are and were false.

The defendants then and there knew they were false.

These defendants printed, whilehed and simulated such charges as aforesaid, and each of them, wilfully and saliciously against this plaintiff. The he intent, then and there, as aforesaid to defend and injure this plaintiff and hold him up to public tiegrace, hat ad and contact.

The said defendants, then and there circulated and distributed a large number of the copies of said newspaper, containing said false and defamatory matter, to the number of to-wit, one hundred thousand in such of the following counties of the State of Illinois, to-wit, Cook, Peoria, he Salle, and McLean, and a large number,

gathering of any fund to aid in bringing about the electric of said William Lerimer to the office of United Senator aforesaid, nor in eracting any fund to reinburse only persons who may have gathered a fund for such purposes.

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and hold him up to public district, hatred the contents.

The said defendants, the end there siredicted and detributed a large masher of the sapita of said a separate or containing said rates and defendant in said a separathe mucher of te-vis, one hundred throughout in said of the following dounties of the State of Hillands, to-vit, to Cook, Peoris, is falle, and Necess, and there aumher,

H

to-wit, one Thousand copies thereof, in each city of the United States.

The said articles, and said cartoons, were fales, untrue and defamatory of this plaintiff. The defendants then and there knew said articles were false, untrue and defanatory of this plaintiff, and they wilfully and maliciously so jublished and circulated that because they were false, untrue and defamatory.

By means of committing of said several grievances by the defendants the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace. To the damage of the plaintiff of (\$25000.00) Twenty-live Thousand Dellars, and therefore he brings his suit, etc.

Defendant by special demurrer to the declaration raised the question whether the language referred to in the innuendoes could be reasonably given the construction and meaning placed on it by the pleader. If it could then the article sharped plaintiff with the counterior of a crime and was of course actionable. If it could not, then the further question arose on general demurrer whether notwithstanding the misinterpretation of the language the article is still a libel.

It was early held in this state that the pleader might by innuendoss restrain and limit the obvious smaller of words actionable per se. Sanford v. Gaddis, 13 Ill.,

, one Thew wad copies thereof, in each oity of the

The self articles, and asid actions, were false, untrue and defendant of this plaintiff. The 'efections' is a set of this plaintiff, and they whichly and they ounly so published and observe they have they are false, untrue and defendance.

By means of cosmitting of estd several grievances by the defendants the girthwill has been and is greatly injured in h id good made, aredit and republished, and brought in to public secondal and disgress. To the image of the lateriff of (\$25000.00) Twenty-five Thousand Orliers, therefore he brings his sait, etc.

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The was early held in this office the views and sight by innuentases restrain and lists the obvious saning of words actionable per se. Conford v. Goddie, 13 [11.]

Where by innuendo a particular meaning is ascrib-329. ed to words the plaintiff is not at liberty to reject that meaning upon the trial and resort to another. The innuendo gives a character to the libel which becomes a part of the issue. Strader et al v. Snyder, 67 Ill. 404. To same effect see werrick v. Tribune Co., 108 Ill. App. 244; and Slaughter v. Johnson 181 Ill. App. 693. It was held in Schmisseur v. greilich, 92 Ill. 347, that where words are actionable per se without colloquium or innuendo that the innuendo may be rejected as surplusage, and this case is cited in 25 Cyc. 452, in support of the text that "The innuendo may be treated as simplusage where it is used in connection with words which are unequivocal and actionable per set. The conclusion reached by some of the courts seems to be that if the innuendo is entirely unnecessary it may be rejected, but if it is necessary it cannot he rejected, and if the plaintiff fails to show the particular meaning placed on the words by the innuendo, he takes nothing even though by their true meaning they are actionable; and by other courts it seems to be held that however unnecessary the innuendo may be if the pleader chooses in that way to accerbe meaning to words he is bound by the meaning so chosen and cannot be heard to say that the words were spoken or written with another and different meaning rendering them actionable. It seems to us the courts of this State are committed to the latter position.

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There are six innuendoes in which clauses of the article are charged to mean: - that plaintiff had participated in bribing members of the General Assembly; that he had contributed money used to buy the votes of members; that he knew members had been bribed and participated therein; that he had knowledge and could show that they had been bribed; that he knew Broderick was guilty of bribery; that he had engaged an attorney to protect those charged with bribery for the reason that he, himself, had participated in such bribery and feared exposure by those so bribed if he did not assist in defending them.

We do not think the trial court erred in holding that the language could not be reasonably understood as construed by these innuendoes. Each part of the article must be construed in connection with all the rest of it and the words taken in the sense which the readers of common and reasonable understanding would ascribe to them. People v. Fuller, 238 Ill. 116.

The publication, read in the light of the averments of facts in the declaration, means that there had been a prolonged heated contest in the Legislature over the election of a United States Senator, that a Republican had been elected by the aid of votes of Democratic Lembers, that bribery of those members had been charged and some of them had been indicted on that charge, that plaintiff was a leader in the Democratic party and had used his

power and influence to produce for the successful

There are charged to mean: - that plaintiff had participated in oribing members of the General Assembly; participated in oribing members of the General Assembly; that he had contributed money used to buy the votes of members; that he knew members had been bribed and participated therein; that he had knowledge and could show that they had been bribed; that he knew broderick was guilty of bribery; that he had engaged an attorney to protect those charged with bribery for the reason that he, himself, had participated in such bribery and feared exposure by those so bribed if he did not assist in defending them.

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candidate the votes of members controlled by him and as active in procuring bail and counsel for those that had been so indicted, that theretofore he had joined in bipartisan movements in public elections and was a friend of the successful candidate in this election. It is common knowledge that in all political contests there are men on each side presumed to have and exercise much influence and power; that the unsuccessful party often charges its defeat to fraud and bribery of voters, and the public is much inclined to believe the charge and sometimes holds the leaders responsible and sometimes has no suspicion that they are guilty, all depending on the supposed character of the leader. The average reader knows the reputation of prominent men mentioned in such publications and guesses and judges accordingly. A moments reflection will recall to any one the names of political leaders whose names mentioned as was plaintiffs in the article in question would not arouse the least suspicion of misconduct, and of other leaders who would be suspected if it was known they had any connection with a contest. We assume plaintiff was, as i alleged in the declaration, a person of good name, oredit and reputation, enjoying the esteem and good opinion of hid neighbots and other worthy citizens of the State, And so assuming we deem it unreasonable to say that the article or any clause of it would be read as charging him with bribery or guilty connection with any attempt to bribe members of the Legislature.

candidate the votes of menters controlled by him and ous active in procuring ball and counsel for those that had been so indicted, that therefore he had joined in biparties new bue emoitoele oliding ni etnemevom masitraq .noiteels widt ai eisblbano fulusesous edt lo common knowledge that in all volitionl convents there ers men on each side presumed to have and exercise much influence and power; that the unsuccessful party often car ,every to greater too hand or death att septem the public is much inclined to believe the charge and somelines lolds the landers companies and model and no quepicion that they are guilty, all depending on the upposed character of the leader. The average restor knows the regutation of prominent men mentioned in such publications and guesses and judges assor Lingly. noments reflection will recall to may one the names of political leaders whose names mentioned as was plaintiffy in the article in question would not aroune the land suspicion of missonduct, and of other leaders who sould be auspected if it was income they had any connection with We worden plaintiff was, as is saleged in a centest. the declaration, a person of good mane, ore it ami repatation, enjoying the esteem and good chinion of blu neighbors and other worthy whitems of the State, and so sagming we deem it unreamonable to say that the article or any clause of it cull's real as clering hir with bribery or guilty connection with any attempt to bribe members of the Legislature.

If the special demurrer was properly sustained, as we hold it was on the ground that the language referred to in the innuendoes could not reseonably as liven the construction and meaning so placed on it, we think it follows that the general demurrar are also properly sustained, even under the rule that the innuendous may be rejected as surplusage and the article read without them, which we do not regard the proper rule in this case, No special damage is alleged and the words are not charged to be published with reference to plaintiffs calling or trade. The question is whether the language is actionable per us. It is true that an action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt or ridicule, even though the same words spoken would not have been actionable, Cerveny v. Chicago Daily News Co., 139 Ill. 345; and it is not essential that the words should involve an imputation of crime. But defamatory words to be libelous per se must be of such a nature that the Court can presume as matter of law that they will tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule or cause him to be shunned and avoided. 25 Cyc 253. The court ought to be able to see that a party's reputation was liable to be injured in some serious and material manner; Foster v. Bons, 38 Ill. App. 613. While to publish of one that he is an anarchist is actionable per se as held in Cerveny v. Chicago Daily News Co. supra, still as intimated in that case

If the special demurrer was properly sustained, it hanvelet epaumnel ent that however ent no saw it blod ew sell marky are authorized the billion admirograph and for he density and warming or placed on it, we taken be firegary only and retramed fareger off todd swollot ad you asobreamni wit trif alone of rahme mays , bent in cated as murghange and the envious read wishout than, which we do not regard the proper rule in this case, Wo of begand for ere shrow end bus begalls at egamb intoque common and common actions of me and a common data. The continued setion is whether the language is actionable per as for true that an action for libel may be sustained for orat Elitabela ent raine of bast ablaw beastloug - towhich hatred, contempt or ridicals, even though the ALGORITHM WAS SENT THE BLOW WEIGHT STORY AND . -- av v. Chioned Daily Mans Co., 120 Iil. 565; and it "The sylvent binede abrow sat that leitness it an of crime. But defenatory words to be liberous -org ase fund and tell erutan a done to ed taum es req NAME AND ADDRESS OF THE PARTY WITH TAKEN THE CONTRACT OF STREET, WHEN THE PARTY WAS TO STREET, W te de the party or hold him my to public hawad. on east or ridicula or causa him to be shunned and avoidas of elds ed of the court or the to be able to as al berujat so or aldelf hav moltaruner afvirso a tedi M. spill or recent greener lateness has surfred with Ma al si Jedt soo to delider of elide .510 .gol .111 anarchist is actionable per as as as held in Cerveny v. Obicare Dally News On. supre. atill as intimated in the case

it is not actionable per se to charge one with a political faith that is not subversive of law and order however unpopular that faith might at the time be in the community where the charge was published. An individual may be brought into contempt or ridicule by professing abourd principles, but when we remember that every political belief is absurd to many, and many of them absurd to large communities, it is readily seen that false charges as to one's political belief and religious convictions in the absence of special lamages should not be held actionable. A false charge that a man was a democrat might injure his business in a republican community or aid it in a democratic community and if he suffered loss from such charge he might on proper pleading and proof recover damages but that is not the question here. There is much difference of opinion on the question of duty to adhere strictly in public matters to the principles of the political organization to which one belongs. It is by many regarded ridiculous and absurd to disregard party lines and assume to be wiser than the party; by others it is deemed the part of great wisdom and virtue to at times disregard those lines. We do not understand that it would be actionable per se to charge a man with entertaining and acting on either of those beliefs. It is not a charge from which the law would p presume damage but would require special damage to be averred and proven before permitting a recovery.

The action is brought to recover damages for injury to reputation, whether there is such injury depends upon

facitifog a ditw eno eggeno of se req eldanoitos fon at ti faith that is not subversive of law and order however unpopular that faith might at the tire had in the community where the onerge we published. An individual was be briefs into contempt or vidicale to professing should relection ries when we were not shor every colitical Delief is absurd to sany, and sany or then absurd to incre or as servado eals? tent ness vilbase at ti .seitinuamoo ent at anotitotynoc avointler bas telled isolitlog ateno absence of special damages should not be held actionable. Affarmed that a man was a democrat might injure his business in a republican community or sid it in a democratic community and if he suffered loss from such charge he might al fall for aspect waveces loomy has nelfacily tagong no not the question here. There is much difference of opinion on the question of duty to adhers strictly in public at moldanimagro labitica and to seldioning ent of erestian which one belongs. It is by many regarded ridiculous and aboutd to dieregard party lines and secure to be Wicer than the party; by others it is deened the part of great wisdom and virtue to at times disregard those mines, of as requelderoites as blues if test bustershow ton ob all charge a man with entertaining and acting on sither of those beliefs. It is not a charge from which the how sould g presume damage but would require onesial damage to be averred and proven before permitting a resovery.

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what the readers of the article were induced by it to believe, and that depends much on the time, place and occasion, A written report of words spoken in the Gridiron Club might incline the reader to admir flow of the person alluded to, while if they had been appear in some other public meeting they would excite hatred and contempt, The public is familiar with cartoons of public an publishing their natural defects, but such cartoons do not empone these men to public hatred, contempt, ridicule or financial injury because they have become so common that the public does not take them in that sense, But a cartoon of the most prominent man in the nation that would be understood in no bad sense might expose a country merchant or justice of the peace to much public ridicule - all because of the license of certain times, places and occasions. That political leaders are subject to much criticism and ridicule not taken seriously by the readir- public, enould not be lost sight of in determining whether any given articls tends to impeach the honesty, integrity, wirths or reputation of a person and thereby to expose him to public hatred, contempt, ridicule or financial injury, which it must be held to do to fall within our Statutory definition of libel.

Defendant in error first entered a special appearance and filed a plea to the jurisdiction of the court, averaing that at the time when etc, it did not reside and was not found in Peoria County, but did reside and light be found in the county of Cook. A demurrer to this plea

what the readers of the article were induced by it to believe, and that depends much on the time, place uni occasion, A written report of words avoice in the height of the standard and the least to be a deal of the contract of the contr the person alluded to, while if they had been apohen in some other public meeting they would excite hetred and contempt, The public is failther with perform of public on pulling of ing their natural defects, but such carteons do not expose these men to public hatred, contempt, ridicule or financial It jury because they have become so common that the putting does not take than in that same, But a cartoon of the montage prominent men in the nation that would be understood in no bad sense might expose a country merchant or justice ad the sample tile - wirelite wilder office or scame and he Liberton of cartain these, Specia and sometime, That political leaders are subject to much entitions and ridicule not taken seriously by the reading public, should merip you redtedy paintinetal of to take tant given article tends to impeach the honesty, integrity, virtue or reputation of a person and thereby to empous him to public hatred, contempt, ridicule or fineroisl injury, which it must be held to do to fall within our Staratory definition of libel.

Defendant in error first entered a special appearance and filed a plee to the jurisdiction of the court, averring that at the time when etc. it ild not really and mannot found in Pearia County, 'out did reside and might be found in the county of Cook, A demarker to this plea

was sustained and cross error is assigned on that action of the court. There was service on an agent of the defendant found in Paoria County and raturn in due form. is no question that the service and return are print india good under Section 8 of our Practice Act, providing for service on provate corporations, at is claimed the place is good under Section 6 of that Act providing "It am 11 not be lawful for any plaintiff to sue any defendant but of the county where the latter resides or may be icual, Judget certain actions not material here. Midland pag. Ry. Co. v. McDermid, 91 Ill. 170; and Silabes v. Quincy Hotal Co., 30 Ill. App. 204, are cited as authority for the proposition that where a corporation does not do business in a c county and has no office or agent located there service can not be had on an officer or agent who happens to come within the county for his private business or pleasure. We do not think the plea raised that question. The savice was prima facie good, no question is made but the writ was served on an officer of the defendant corporation, and if it be true that it was not doing business in Peorla county

and had no office or agent located there and the Lent served was there on his own business or placeurs, the fact should have been more specifically pleaded. The general averant of nonresidence was not sufficient. Willard v. Zehr, 215 Ill. 148. The court did not err in sustaining the desurrer to the plea.

The judgment is affirmed

molifer this no hempless of rorre seers bas benisters worthis will be discounted on palyting part where .75 pts acc 35 camb found in Pageta Novin'y ave raining by her farm. alook andre one mruter ban colvres edt tada moiteaup on al mood under Section 8 of our Fractice Act, providing for asia sal Lamiale si tr service on provete corporations, mildient to the time to a moltone teamy been at tachaeleb yas out flithisla was not fulwel ed to county where the latter resides or may be found, except* Midland sag, Ry. Cc. certain actions not material hers. v. McDermid, 91 Ill. 176; and Silabes v. Quincy Motel Co., 30 Ill. App. 204, are cited as authority for the proposition that where a corporation does not do business in a c salvane small befool from to solito on all hos vinces can not be had on an officer or scent who happens to acus in the county for his private husiness or pleasurs. spives. sol .moissaup tadt besist seld edt amidt ton os ... es prima facte good, no question is made but the cut was sived on an officer of the defendant corporation, the if inco since in seeming of the series of the Paris of the and had no office or agent locates there and the areat without there on his own husiness or pic sure, the fact eleval.

been more epstifically pisted. The gun this area and comresidence was not sufficient, Villand v. Notr, Ell.

148. The court did not are in sustaining the denormal

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The judgment is affirmed

STATE OF ILLINOIS, SECOND DISTRICT. SECOND DISTRICT. II. CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois: Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 1861.A. 275

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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No. 5934.

D. C. Miller,

appellant.

Ve

Eva S. Liljerstrom, appellee.

186 I.A. 275
Appeal from the County Court of

Appeal from the County Court of Knox County.

Opinion by CARNES, J.

Appellant a lawyer sued appelles an uneducated working woman in assumpsit to resover half the value of real estate which she took as sole devises named in the will of her father who died in 1911. It appears that & appellee was an illegitimate child, and while she lived with or near her father and was recognized and treated by him as a daughter, she for several years had known that she could not inherit his property, and he, unfamiliar with business affairs, delayed and neglected to make a will in her favor. She discussed the matter with appellant at his home in May 1905, and he drafted for her a paper for her father to sign which he entitled "The acknowledging and owning of a child", but the signature was not obtained. Appellant claims that afterwards he employed a mutual friend of himself and the testator to labor with the old man to make a will giving appellee all of his property, and that the will executed was the result of the promussion so prompted, and that he had an oral contract with appelles made in

n. O. miller,

appellant.

T

. S. Liljerstrom,

appellee.

372 A.1081

Apperl from the County Court of Macs County.

OPINION NA CASTON, 31

ladrophonn na sellegra beun reywall a tmaileggh oully eds bled revoser of rlegnusss of namow polyrow of real estate which whe took as sole devices named in the MIND of Not folder the died to 1912. It appears that a appelles was on illegitherts child, and white she live! Legrant bas besignoper saw has redter red rasa to it by him as a daughter, she for asystell years had known atiliant of the could not inherit bis property, and has unfamilian with buciness affairs, delayed and neglecter to make a will in her favor. She disoused the maiter with rel hathark ed has, 3001 yeM at smed aid to traffequa i elvitae ed deidu ante of redfal red rol reasy a red The scinowledging and owning of a child", become signature was not obtained. As ellert claims that ime lie and to broit? lander a herologe of shrawredle the testate to labor with the all men of an antest and giving appelles all of his property, and that the will designat on monagners sit to these sit saw betweens and which had an onel contract with appear of the May 1905, that he should receive one-half of shatever of her father's property he might obtain for her and that the property so obtained amounted in value to about \$2000.

Appellant testified to the oral contract, as did also his daughter. Appellee testified lenying that the made the centract or any contract of that nature; there was other evidence in the case tending to corroborate each of the It is doubtful whether the surpretions of the mutual friend induced the will in question, and it does not appear that appellant paid anything for thatever have been done in that regard. The jury found for the defendant and judgment was entered on the verdict. Te are asked to reverse and remand the case solely on the ground that the avidence dose not support the vardict, no error of law is complained of: We are not inclined to disturd the judgment; The record does not present a case in which a reviewing court should set saids the verdict of a jury sanctioned by the trial judge; and in our opinion it is a case in which successive juries would almost certainly return the same verdict. whe judgment is affirmed.

1805, that he chark reasive one-balf of whitever of ter Lether's property he might obtain for her and that the

Appellant teachilat to the oral continuet, as did lan oft show siz sidt salvach hellides sellage . zasdpush it relife our eredt jongtom that he themenes was no thantnes vidence in the case tending to corroborate each of the ada to encitaryone eir redreda introcent al .aait son seed it but , notherp at film eds becamet busing far . spile the appellant paid angithted for whatever our inve a done in that nagani. . The jury found for the all aligned and servers and for might and imphasis LIB. My edr in yleica sone edr biminer lib earever or bein -int the evidence does not enquerous and entitles, no error of lamisin of fertion; for are of .io femisimoo ai wal the judgment. . The resond does not a strength of is being west arian too simula truce pulvetres a dolar a jury canciloned by the tried judges and in our inion it is a case in thich accessive juries . ald almost certainly return the came vondict. .bearitus at inon, but sub-

STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois: Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 186 I.A. 276

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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AND THE CHARGE, WINDERSON, CO. A.

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No. 5838.

William Noonen,

Appellee

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s Appeal from Whiteside.

Theodore Gebhardt,

Appellant,

18614.276

Opinion by CARNES, J.

William Noonan, Appellee, hereinafter called plaintiff, sued Theodore Gebhardt, Appellant, hereinafter called defendant, in assumpsit for commissions on the sale of a farm, and had verdict and judgment for \$2400.00 from which this appeal is prosecuted.

The defendant was the owner of a farm of 240 acres in Lee County, Ill. he listed it for sale with A. P. Porter, a real estate agent at Sterling, Ill. Porter interested the plaintiff who was engaged in bringing purchasers of farm lands from the central part of the state to them more northern counties, and the plaintiff, with Porter and two land seekers named Bree and Ludwig, drove to defendant's farm. It is claimed by plaintiff that while there the defendant agreed with him that he might, if he affected a sale, have anything received in excess of \$125.00 an acre. The farm was soon afterwards sold to David J. Gilchrist, a purchaser produced by plaintiff, for \$135.00 an acre. it is also claimed by plaintiff that the contract between himself and defendant was re-affirmed at the time

No. 5828.

William Moonen,

Appellee

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Theodore Gebhardt,

Appellant,

Appeal from Whiteside.

Opicion by Others, J.

William Knowen, Appalies, hereissiter called plaintiff, such Theodore nothers of land, Appaliant, Appaliant, hereissites of the defendant, in cosmpalt for of the location of the calles of the EACO.CO

The defendant was the owner of a farm of S40 acres in hee County, Ill. he listed it for sale with A. P. Porter, a real estate agent at Sterling, Ill. Porter intersated the plaintiff who was engaged in bringing purchasers of farm lands from the central part of the state to them more northern counties, and the plaintiff, with Forter and two land seekers named Bree and Ludwig, drove to defendant's farm. It is claimed by plaintiff that while there the defendant agreed with him that he might, if he affected acre, have anything received in encese of \$1.05.00 and series. The farm was soon afterwards acid to havid J. Sare. The farm was soon afterwards acid to havid J. Cilchrist, a purchaser produced by plaintiff, for \$1.55.00 and serves himself and defendant was re-affirmed at the time

of the negotiations with Gilchrist. Defendant denies that he made such an agreement, or any agreement whatever for commissions with plaintiff, and the case turns on that question of fact.

Coundel for appellant say the proof of the contract rests on the unsupposted testimony of the plaintiff as a witness, and that he is impeached by other credible testimony, and he callsattention to various contradictions in the testimony of plaintiff and Bree, Ludwig and Gilchrist as to what was said and what occurred in conversations between them, but not more than is often found in the narrations of honest, intelligent peopel of conversations and events related after quite a lapse of time, as in this casewhere the testimony was given more than a year after the occurrance. These contradictions statements relate to times and places when and where certain statements were made, the language used, etc., and are such as to indicate not untruthfylness, but a lack of memory of details surrounding an important statement or transaction. plaintiff was corroborated by two witnesses, porter and one Thompson, but counsel say there is no probative force in their testimony because in details they disagree; yet there seems to be little if any more than the usual discrepancy of statements among honest people who have not been carefully over the matter together in an attempt to reconcile their conflicting recollections.

of the negotiations with Gilchrist. Defendant denies that he made such an agreement, or any agreement whatever for commissions with plaintiff, and the case turns on that question of fact.

Counsel for sopellant say the proof of the contract rests on the unsupported testineny of the plaintiff as a witness, and that he is impeacined by other credible testimeny, and he calleasterilin to various orottelictions is the testimony of plaintiff and Bree, latering and -moo ni bernooo tanw bas bisa esw tanw or as tairnollo versations between them, but not more than is often found in the narrations of honest, intelligent peopel of conservitors and events related times and trees of these as in this casewhere the testinony was given more than a past atter the constrance. These sontrallstone erear ins medy essely has sent of edeler of mene certain statements were ands, the language used, etc., a fud , evenly later ton eracibnt of as down era bas Lesk of memory of details surrounding on important statewent or transposition. . plainter as correctated by the witnesses, morter and one Thompson, but counsel say there is no probative force in their testimony because in details they disagree; yes there seems to be little it any guous stransture to youngeroath laws and and eron thirtie wir have the projection ment has avail only adjoint deemed bogether in an attempt to reconcile their centilating raccifoctions.

The theory of plaintiff's case is that the defendant had placed the farm in Porter's hands for sale at \$125.00 an acre and Porter was to receive a commission of \$1.00 an acre; this is testified to by Porter and denied as to the selling price by defendant. Defendant was asked on cross examination if he had not placed the farm with other agents named for sale at \$125.00 an acre, and was compelled to answer over the objection of his attorney. ...e denied that he had done so. These other agents were called as witnesses in rebuital by plaintiff and testified that the defendant did so place the farm with them. mhis is urged by appellant as reversible error. We are of the opinion that the svidence was incompetent, but it was not objected to and therefore appellant cannot herecomplain of that. It was not harmful error to require the defendant to answer whether he did so offer his farm for he denied that he did so, and counsel could not permit the other witnesses to testify without objection and take the benefit of their evidence if they corroborated the defendant, or assign error on it if they did not.

There was ample evidence introduced by the plaintiff to support the verdict.

The defendant as a witness flatly denied every statement on which his liability to the plaintiff could be based. We was contradicted by other witnesses in the case as well as by the plaintiff, and the contradictions were of a character not to be readily excused

Production of the state of the of placed the ferm in Porter's hunds for cale at \$126.00 an 00.1 To motaciones a everes to averge and Porter and act of as beineb bus retrof yo of belilitaet at aldi ;eros walling price by Ostendons. Parendons we cared on cross as abaction if he had seemed to be the hora compelled to answer over the objection of his attorney. _ Confection that he had core so. These oring scents were -ifeet and aliminist vo laifuder at esecentiv as bellac fied that the defendant did so place the farm with them. . Torre eldishover as traffeque vo begru at side , instegmoonl ase comebive eds fadt molnige adt to era ell Jast's yet wertured has ad Defending for one di fud count herebonglein of that. It was not beingulered tonne or bis of rediedy rewers of inshered and eriper of offer his farm for he demied that he did so, and command bright not permit when which williams on burning senshive misdt to titamed and exat bas moitestdo twodtiw if they corroborated the defendant, or assign serior on it the they als made to

Phere was ample evidence intended by the plaintiff to support the vertict.

The defendant as a mitness flatly denied every statement on which his liability to the plaintiff could be based. He was contradicted by other litrasuss in the case as well as by the plaintiff, and the contradictions were of a character not to be readily excused

on the ground of a lack of memoty. It was for the jury and trial judge to pass on the credibility of the witnesses, and this record presents a strong illustration of the wisdom of the rule requiring them, with their superior opportunities for judging, to do so, and forbidding a reversal by the reviewing court unless the verdict is manifestly against the weight of the evidence. The plaintiff was not a resident of the county wherethe case was tried and his claim was not one that a jury would be likely to regard with under favor. There is no reason to doubt that their verdict was based on an honest consideration of the evidence, and it should not be disturbed in the absence of material error of law.

It is argued that the Court erred in permitting a witness to testify that a fact of which he spoke was fixed in his mind by his making a written memorands of it The memoranda was not shortly after it occurred. offered in evidence and we see no prejudicial error in that evidence. Complaint is made of an instruction that is said to fail to direct the jury that their belief must be based on the evidence. Graff v. The People, 134 Ill. 380 and Langdon b. The People, 133 Ill. 383 are cited as illustrations of the law that the jury must base their belief on the evidence and that such requirement must not be ignored in the instruction. But the instruction complained of falls within the rule announced in Village of Altmont v. Carter, 196 Ill. 286 where it id said, "A requirement in the first part of an instructrial jud to just the country where the case was tried and his country where the case was tried and his country where the case was tried and his wander favor. There is no nessen to doubt that their verwands of the case was tried and his with and extense favor. There is no nessen to doubt that their verwands of the case was tried and his wall and the case was tried and his with and extense of their verwands to have the case was that their verwands to have a second of the case of material.

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Complaint is made of the action of the Court in giving and refusing other instructions, but we fail to find any prejuducual error in that respect. As we read the record the defendant had a fair trial before a jury fairly instructed on the law, and we find no reason for reversing the judgment of the Court approving their verdict. The judgment is affirmed.

Affirmed.

thet the jury must base their findings upon the complise and extends to all subsequent clauses in the instruction, and it is unnecessary in each of the currending sections to inform the jury that they must find it a preponderance of the evidence.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 186 T.A. 277

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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C. V. O'Connor,

Appelles, Appeal from Boone.

P. R. Kennedy,

Appellant.

186 I.A 277

Opinion by CARNES, J.

Appellant, P. R. Kennedy, sold a farm in Boons County, 711., to one Schwebke. Appellee, C. V. O'Conner, had come connection with negotiations between Kennedy and Schwebke prior to the sale and demanded of yennedy a commission, claiming that he secured the purchaser and that Kennedy had promised him a countseion if he would secure This action was brought on that claim and a purchaser. resulted in a verdict and judgment for appellee of \$608.54, from which this appeal is procacuted.

Appellee is not a real estate agent, but is engaged in other business at the City of Belviders in said County. While this fact does not affact his rights to recover a commission for the sale of the farm, if he at the instance of appellant prosured the purchaser, still his connection with the transaction, and what the parties understood and had a right to understand from various things said and done, should be considered in the light of the fact that he x was an acquaintance or friend of Kennedy and a not ergoged in selling faem lands as a business.

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Appaliant,

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F. S. Domiller

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A STREET OF STREET

Appellant, T. R. Kennedy, till a farm in Boths, full a farm in Boths, full accessoration with merchins between the med, and almelm grains to the ealers of manufed. Typenesty and almelm grains to the ealers of manufed. Typenesty and accessoration and that is remarked the multipleasure and that promised him a commiss the granitans and that accessors of the multipleasure and that accessor for a patient olain and alments of the state of the state

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The evidence is so conflicting that the verdict should only be accepted as controlling in the absence of naturial error of law.

Appellee, over objections of appellant, introduced svidence of attemptes by appellant to sell the farm through other agents and of prices named by him and commissions offered. And it so appeared that the sale in question was a good one and more advantageous to appellant than would have been a sale under him former proposals. The jury in this way was informal of facts not pertinant to the issue that probably influenced their verdict. Appellae defends the introduction of this evidence on the ground that appellant's counsel in his opening statement to the jury made assertions that furnished the ground for introduction of this testimony, as explaining or aupplementing the statement so rade; also that appellant as a witness mentioned the fact that he had employed other agents to sell the land. We do not think the grounds sufficient to warrant the evidence introduced, but as the provocation for that line of testimony will probably not be offered on another trial, we need not go further into detail on that question.

The Court at the instance of appelles instructed the jury, "That the fact that the number of witnesses testifying on one side is larger than the marker testifying on the other side, does not necessarily, alone determine that the preponderance of the evidence is on

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A palley, over objections of mysellers, in order on " and of the of smalley a partie that the early has mid of bourn seate, to bay others well by al ere so dul'o genera o di ral . Bergilo simiat Anifilen, a de alegarante dons ano dons aco los de alegarante Mild would have been a wide white him from corresing almed to this say was inferent of feets net partitions analysis rish is equally principle of special risks eff Junitive side a mostarbonent eff elected ecite in a star pointer at it is the more efficiency and the congol turer and and limit a to emolitioness when your rotation of this tentines, no replaining the fielling full oil, pass or decembers self politically, in i gon la li ef s'all font est benefamen escativ a s' ment out in committee about the glass of annual rapids incia, entre i dente de para de partollara alamo Illu muchina to a self of direct galancerous esta as a reflection of the visit is the second of the reflection . mails of their in Plases simi aldiam'

The Court of the impress of equality in the formation of the jumpy, "The test fines is the member of it to the statement of the court o

the side for which the larger number testified. In order to determine that question, the jury must be influenced by and take into consideration the appearance and conduct of the witnesses while testifying; their apparent intelligence, or lack of it; their opportunity of knowing or seeing the fact, or subject concerning which they have testified, or the absence of such apparentiality; their interest or absence of interest in the result of the case, and from all these facts as shown by the evidence, the jury must decide upon which side is the preponderance ".

By this instruction the jury were told that the law required them to consider the appearance of the mitesass, their apparent intelligence, their means of knowledge and their interest or want of interest in the result of the case and from these four things excluding questions of the number of witnesses, the reasonableness of their statements, their corroboration by other evidence and other considerations that properly induce a belief or disbolief of the statements of our fellow man, datarmine the "t is difficult to see why matter of preponderance. it was ever presumed necessary or proper to anumerate to a jury the points that they must, as a matter of law, consider in determining the credibility of a witness. If they delieve or disbelieve, as jurors, guided by their knowledge and experience as men, they will give or withholdbonfidence for verious reasons that they hight

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be able to state but would hesitate to say that they were influenced only by matters that could be clearly defened. Our Supreme Court long ago said, "A Court can hardly err in refusing to give any instruction which seems designed to influence a jury as to the credit to be given to particular witnesses." Martin v. People 54 Ill. 235, and repeated the statement in Godar v. Ham Nat. Bank 235 711. 572?.

The instruction here complained of would not if construed as excluding the question of the number of witnesses be held reversible error un er the authority of E. J. & E. Ry. Co. v. Lawler, 239 Ill. 631 and the cases there reviewed and the numerous subsequent case's in which that case is cited and discussed, because the greater number of witnesses cannot be said to have testified for appellee on any controverted fact, but in that case while points to be considered were enumerated in an instruction, the jury were told they should consider them " In view of all the other svidence, facts and circumstances proved in the trial, and from all the evidence, facts and circumstances in evidence determine on which side is the weight or preponderance of the evidence. " Thus only improperly excluding the factor of number of witnesses . The instruction in our case is bad and substantial error under the rule announced in Chicago Union grac, Cc. v. Hampe, 328 111. 346, where the Court said , "It is proper to enumerate elements which they (the jury)

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can hardly err in refeating to give only instruction which

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lead to particular situences. Martin v. People St. Ill.

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consider all the evidence introduced and all the facts and circumstances shown upon the triel, in determining the crucial question as to where lies the greater weight of the proof". While it is true that instructions of this character have the sanction of law if accurately worded and are not in every case held reversible error even if inaccurates and subject to criticism, and the instruction is somewhat helped by another given for appellee still from the reading of this record we conclude because of the errors here hointed out the case should be submitted to another jury.

The judgment is reversed and the cause remanded.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clere 6 1.A. 279

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5854.

Bertha Martukis, Ge. appellee

VS

Appeal from Winnebago.

Ferdinand P. Keyt, appellant.

Carnes, J.

186 I.A. 279

Appellee Bertha Martukis a girl sixteen years old alighted from a street car in the city of Reckford and in endeavoring to cross the street she was struck and injured by a taxi-cab owned by appellant. She broughtthis suit to recover damages for such injury and ad verift of judgmes. The evidence is very conflicting as to where she was when struck, whether she was mindful of surrounding conditions or had her attention on other matters; also as to the rate of speed of the taxi-cab and the effort made by the driver to give warning and avoid danger. The record leads quite as strongly to the conclusion that the accident was caused by the careleseness of appelles of the combined our elements of herself and the driver of the car, as it does to the conclusion that she was in the exercise of ordinary care and the driver was guilty of negligence causing the injury. In the absence of error of law we might feel compelled to treat the verdict of the jury as controlling, but we are not inclined to do so if there was materialerror of law.

The 9th. instruction asked by appellee and given, read:

"The Court instructs the jury as a matter of law that if you believe from the evidence that any of the witnesses have wilfully testified falsely to any material fact in evidence then you willbe entitled to entirely disregard any of the evidence of this witness in so far as his testimony is not corroborated by other competent evidence." This instruction is bad under the authority of Weston v Teufel 213 Ill.

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PROBLEM STORY OF SHARKSHIP.

186I.A. 279

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whether evidence is or is not competent. The instruction erroneously uses the word 'competent' instead of the word 'credible' or other work of like import. Evidence introduced may be competent and not credible. Instructions of this character are of doubtful propriety; a court can hardly err in refusing them; Martin v People 54 Ill. 235, Godair v Ham. Nat. Bank 235 Ill. 572, when accurately worded thay have the sanction of the law and trial courts often feel compelled to give themisf asked, but there are many expressions in opinions of the supreme and appellate courts that should warn counsel of the danger of asking these cautionary instructions not accurately worded.

The judgment is reversed and the cause remanded.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 1861A 280

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5858

Annie Jopp, et al, appelless

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Appeal from Lake.

R. H. Fairburn et al appellants.

186 I.A. 280

Carnes, J.

Barthomic Jopp died as the result of an accident
October 11, 1907. His widow and children, appellees, brought
this action under Section 9 of the Dram-Shop Act against R.
H. Fairburn a saloon keeper, and the appellant Furture Bros.
Brewing Co. alleged to be the owner of the building in
which the saloon was kept. The case was here on a former
appeal and our opinion is reported in 157 Ill. App. 609.
On retrial there was a verdict and judgment against both
defendants for \$1300 and the Brewing Company only appeals.

Appellant's statement and argument is confined to two pages of reading matter; there is no attempt to state the pleadings or the facts. It is in substance ascerted that there is no proof that appellant owned the building at the time in question, or that it knew intoxicating liquors were sold there; that a saloon way be a place where soft drinks are sold, and beer goes not necessarily mean lager beer.

It appears from the abstract that the president of appellant stated that Fairburn conducted a saloon on said premises from the time it, appellant, purchased the building in 1901 until the district became a dry zone in 1908, and sold quantities of beer for a pellant. There is other evidence that lager beer was sold there. It is not suggested that the proof does not sustain the averments in the declaration that deceased purchased intoxicating liquors there, that caused his intoxication and death. There is other evidence as to pay ant of licence and note as of alcoholists, and have

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Annie Jorgo, et al, e. . ilese

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how that the place was a dram shop and the building o mad of appellant and leased for dram-shop purposes. The jury are fully warranted in so finding from the evidence.

We find no substantial error in the record., therefore the judgment is affirmed.
Thitney P. J. took no part.

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STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, Do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

240)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 286

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5866.

Amie I. Adams, appellant.

VS

Appeal from Lake.

John Gordon, appellee

186 I.A. 286

Carnes, J.

Appellee, John Gordon, owned a tract of land in Lake County, Illinois, and intered into a contract with one Tra cy to sell him a part of it, in which contract it was provided that Tracy should have the right to use a well and its appurtenances and a path not according B feet in width, landing to the well located on that part of the tract not sold, under certain conditions are diffied, until much time as mulain water should be laid and installed in an adjoining public street or highway. Afterwards appellee conveyed the land so contracted, to Tracy and he conveyed it to Amie I. Adams the appellant by an ordinary warranty deed with no recital of easements or appurtenances. Afterwards appellee denied appellant the use of the well and barricaded said pathway. Appellant filed a bill in chancery praying for an injunction restraining appellee from interfering with her use of the path and well claiming an easement therein. The court suetained an demurrer to an amended bill and appellant standing by said amended bill it was ordered dismissed for want of equity, and she prosecutes this appeal. The question is whether appellant has in her bill set up facts entitling her to an easement in the well and pathway for that indefinite time that may elapse before public water is furnished in said street or highway, which may be forecer or may be during the life of appellant. In either event the interest that she is contending for is a freehold. 16 Cyc 614. "A perpetual easement inlands, or any interest in lands

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Aguilse, Rohn Gurion, aradia dract of a nd an bohn county, Milimote, est measure into a consumation of the exarbitrar or this or word little at , it is that a mini file a thi ann illum a ban as highr a fa armi illumin your? full apurtonances int a poth nor and called 8 fort to the line the to tend on the talk no her and live of of med. ile a pa unit done lifer the bloom one of home sindaes websstille rainities or he relieved from that of biroto is a sin frequency to a since a fix a signal so to the o contricted, to luncy indica convoyed it to that I, since I while a or ifthe fear opening was able to a series of i o litto fina billa alla econometro i co finalessa in The little of the feel between the lies and it was and tradition a Angellant fall to bill to biology proping at this o bold't trailings tin it a most from their that will safe as coninterter - was a final of the synthesis file in the star triand am denourer to the lifet held trialings retroated ma bander . .. in' monthe to Seit Green and At III. Asimon - Est of pair of squarge as in the mid and a duce promotion of the factors as il in sion of the lift and in one parties a medicin al alimn with the tree typical with figure and the distance of th if the line of the parties will not to the ed to . It is a training the field the state of th ther this are the real bound , on they also with edst juice in . All out of a contract of a contract of a contract of a contract of the first of the control of the first of the

in the nature of such easement, when credited by grant, or by any proceeding which is in law equivalent to a grant, constitutes a freehold. A legal interest in lands is to be deemed a freehold, not because of the kind or quantity of the interest, but by reason of its sufficient legal indefinite duration. An easement for life or in fee is a freehold. The Chaplin v Commissioners of Highways 126 Ill. 264; See also Foote v Marggraf, 253 Ill. 48; Haigh v Lenfesty 141 Ill.

App. 409; Craig v Craig, 154 Ill. App. 1. As the case involves a freehold the appeal should have been taken to the Supreme Court. The clerk is therefore directed to transfer the record and files and the order of this court to the Supreme Court.

Transferred to the Supreme Court. Whitney, P. J. took no part.

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STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

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AT A TERM OF THE APPELLATE COURT,

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Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 196 I.A. 292

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5873.

Erneste Wulfe, appellee

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Appeal from Kankakes.

American Packing and Provision Company, appellant.

Carnes, J.

186 I.A. 292

Appellant, American Packing and Provision Co., was having some cattle driven along a public highway to its packinghouse at Kankakee. When near their destination a cow lay down and on being made to get up went but a short distance and lay down again, it was then left tied for an hour or two while the rest of the cattle were driven on to their destination. A man and woman were employed by appellant to go out and bring her in. Appellee Erneste Wulfe, a middle aged woman had been working on a piece of land in the neighborhood and was walking home in the highway and passed the amployees of appellant and the cow, she says she gave some advice about getting the cow to go along, and appellants witnesses say she tried to assist and hit the cow with her hoe; at any rate she passed on ahead of the cow and when she had gone fifty or one hundred feet the cow got up and ran down the road and against her and knocked her down, to some extent bruising and injuring her. She brought this suit to recover for that injury and alleged in different counts of her declaration that appellants servants negligently struck and over drove the cow and caused her to become overheated and attack the plaintiff; that appellant negligently over drove and overheated the animal and struck and abused her until she became overheated andangry; that appellant was driving the cow and she was vicious and inclined to attack persons and that appellant knew it and failed

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282 A. I 381

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Appellant, Areston Pasking of Posteron Ct., . & . A or mention this . mode moving office the market sachinghouse at Ham whee, When the then Aster tion to -n't stone a fed ther quiren of clar intel no the mish you and an lay down a min, it a milen left his day, in Low to maying agon elither on the deep said elither own to such or thing a go tagoig a gast to the meal another break the cibilt is each or ever of cults 1 , wit can out it in two c 🗝 the early a door to easily which puldrow made and moment 👚 🦠 The contract of the grant and the contract of uployees of arguillant and all own, and all a street satile of in the case of who said gainsp spoil god with this say that to made so tuned unto gas assessed to Time to the say he been no bearing sit of a greate to mai to an dec suo est teste testend sau su ytill eso comi sul and the read and read her and her read forther had been all Jose Fall Action Fall , wed noticely the painting of . Ingre sa i file at it, if it weight this rol revoors of gate all a section of the section of the section of the section of r de la compaña Control A An An . 1. millioners and every revo place end abuned her mattle the bear of the test that and beauth her intlus a tri empirir annul'm qui noc a a refutab se comuliegni talk the offerent states and the emercia dearly

to provide sufficient persons to manage the cow; that appellant was driving cattle on the street and that its servants were incompetent. There was verdict and judgment for \$800 for appellee from which this areal is prosecuted and reversal sought on the ground of negligence on the part of appellee; no negligence on the part of appellant and that the damages are highly excessive.

There is no evidence that the cow was naturally vicious or that appellant had any reason to suspect or believe that she was vicious. Appellees theory is that she was overheated in driving and improperly weaten and goaded until she became frantio, and attacked appellae. The evidence does not support that theory. It is quite clear that it was an ordinary case of driving cattle along the public highway, this cow lay down sither because he was overheated or foot sore, appellants servants took the usual and ordinary means to get her up and drive her along the road; appelles, the cow, and appellants servants were all rightfully in the highway, the cow unexpectedly either attacked or run against appellee. We see nothing to distinguish the case from others where a domestic animal with no known vicious tendencies attacks and injures a person. We do not think the jury could reasonably find that because this animal was footsore or overheated and lay down beside the road, that it was evidence of a vicious tendency or any notice to appellant that she wasliable to attack or injure a person, and we see no evidence in the record that the injury was attributable to any negligence of appellant. It is said appelles was negligent in not watching the cow and guarding against injury. We do not assent to that. We are of opinion that ordinarily prudent people in the position of either appellee or appellants servants, would not have intidipated any danger.

to provide sufficient persons to mange the now; that special land was incompetent. There was vertice and judgment for "800 for appelies from thich this as made to presented and removered to versal sought on the proved of negligence of art of the president and the table to be a second to the transfer of negligence or the part of the days are are highly expensive.

There is no evidence that the new was matureally To forest of more were had tablisans rait to auciciv ballove that she was whether A carology as we said svoiled Bebase una metaca viragoroma has privitab ni betsentavo esw until she became francic, and attached thealths. The ovidence does not tuncert that theory. It is rules of it tail it was an ordinary olse of driving outily along the public highway, this cow lay down either because the was avenuested or include the sali work strayuse rineliserge , eree took to dinary means to est her on and drive has cheer the to dis--dial fit ever aiminger primilers a bne , woo shi , ee Legge fully in the highway, the cov unempertally area o tundler or ann aminus entelles, To see nothing to destinguish a caso from officers have to confide and the more caso tendencies atticole and injures a passon. Is de not think Lachne sait espiced fact brill gifenoassu place gut sil was footnote or over saced and Inc donn bestin his tid. . Sait . The ar opposited againing the a maline and the tail compliant that his would big to chesting out in the company own gradule to the hand a soft at sometive on see on fant Attaibutable to any moral reach of ere int. It is in the which has mor not enthorm you at the otipes as sollsage Lainst injury. We do not soront to thit, "is no of a invethat ordinarily sundent prople in the corritor of the AND AND ANY OF THE PARTY OF THE

AND CHICKES,

It is familiar law that the owner of a domestic animal of a species not inclined to mischief is not liable for injury committed by it to the person of another in the absence of notice to the owner of mischievous tendencies of the animal. Dommy Hollenbeck, 359 Ill. 383 is a late case announcing that law. We do not think a judgment for a pellee can be sustained by the facts of this case without ignoring that law. We presume another trial would not show the facts aterially different from those disclosed by this record; therefore we reverse the judgment without remanding the case.

The judgment is reversed.

Finding of facts.

We find that the defendant gas not guilty of any negligence which caused or contributed to the injury for thick plainths sues.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

5874 (943)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk!

J. G. MISCHKE, Sheriff.

186 I.A. 293

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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No. 5874.

Julia E. Wood, Administratrix)
of the Estate of Willoam Wood,
Appelles,

VS

James E. McEvoy and Julia Wood Mc Evoy,

Appellants.

Appeal from La Salle.

186 I.A. 293

Opinion by CARNES. J.

This suit was begun in assumpsit by William Wood, against his sister Julia Wood McEvoy and her husband James E. McEvoy, the appellants, to recover \$1350 received by appellants as purchase price for a twenty acre tract and an undivided half interest in another twenty acre tract of land conveyed by them to one pansel, which lands he claimed to own. After a partial trial before a jury the case was transferred to the chancery side, bill and answer filed, and proofs heard by the chancellor, resulting in a decree against appellants for the whole amount with interest, less a counter claim about which there is no dispute. The chancery record only is filed here, the question presented is whether or not William Wood was the equitable owner of the land so sold.

James Wood, the father of William and Julia Wood, died at the home of his daughter Julia October 81, 1908, aged eighty@twO years. ... had been living there about

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julia I. Wood, Administrately,

the Istate of Willows Wood,

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1861A. 293

Opinion by CARETG. J.

This suit was become in security by Tillian Food, to fix along the sister Julia Food Metroy and he indeed James T. McEvoy, the sopeliants as purchase gaves for a creaty received by aspellants as purchase gaves for a creaty sore tract and an undivided half interest in another treaty were tract of land conveyed as them to one purces, which lands he called to wen. After a purtical crimical is inverse a jury the case and ranaferred to the characty size, bill and answer filed, and a after a purtical by the charact filed, and a after a country of the whole amount with inverse, less a country like in which there is no disjunce. The shapest of each of the filed hore, the passage of the character of the wheels of the passage of the character of the character of the character of the character of the land of the call.

Jewes Wood, the father of William and Julta Well, the Lied at the home of his dementer Julia Catcher al, 1828, aged sighty@but years. __ a hall been highly there about

four years, was in very infirm health and when he came there his business affairs were in bad condition. He gave a general power of attorney to his son-in-law lames E. McEvoy, who took charge of his business, and his daughter julis provided for his health and confort during the rest of his life. There is no question made here about his mental capacity, but his physical condition was apparently such, during the four years he resided with appellants, that he could not and did not give much attention to his property.

The two twenty acre tracts in question were for the most part unimproval and unproductive, they were in the came quarter section but not adjoining, and were located in Grundy County, Illinois, near the home farm of james Wood. William Wood and one Gibbs, prior to 1878, had title to one of these tracts as tenants in common, and in 1878 James Wood got a deed to himself from Gibbs of his half interest in the tract, in consideration of the transfer to Gibbs of William's interest in a saloon business that he, William, owned, and a horse owned by James Wood. It is claimed by William, and there is evidence supporting his claim, that at the time his father owed him \$300. The other twenty acre tract was conveyed to games Wood in 1884, William negotiated the purchase of the tract and directed the deed to be made to his father, he claimes he paid the purchase price himself with money obtained on a note signed by himself and one Coulihan, and there is

four year, wer in yeary instruction and then he came
there his business offsine cere is hed condition. It
game a general passer of afromey for his conditions, and
toute I. Mornoy, who well on age of his hushos, and
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add to. atam molducare oil odovia eron ydrawa owd edg nost part unimproved and unproductive, they were in the came gi le cos ser ber ganniciba don dud molden reducup Grandy County, Illinois, near the hors fare of james Word, William Wood, and one Oibbo, orior to 1878, had tille to one of these tracts as tements in semmon, and in 1878 Jones Wood got a deed to himself from Gibb, af File half it the tract, in consideration of the transfer to interpol Olibba of William's interest in a salper business the ils. William, o ned, and w horse ourse or Just Mack, It is claimed by William, and there is evidence may outof his claim, that his els of a refer one it in this int " carar had have more about the see when it redto ed I in 1884, William repolition of the parties of the rach .ni afficeral in ed. (1. 1 1.1 1.1 et etam ed næ herb edd hefeatil This is a strategy we now heavy note signed by bisself and one Confident, and Nert in evidence to support that claim. At about the time of these conveyances one Reed occupied the forty acres as a tenant of William for five or six years, paying him rent and not knowing that James Wood claimed any interest in the land, though he lived near by at the time. While the record title to this forty actes was in James Wood, with the exception of the undivided half of one of the twenty acre tracts, it is admitted to have been understood in the family up to about the time James went to live with appellants, that the entire forty acres belonged to William, He was intemperate and improvident, the land of little rental value, and little attention seems to have been given it, except to hasp the texes paid, during the lifetime of James Wood; both the twenty acre tracts were dealt with as a whole in renting and paying taxes, While McEvoy was acting as attorney in fact he contracted to sell the land and William claims that on discovering it he protested, with the regult that the trade was abandoned and deeds that had been prepared were destroyed. There is a controversy about this matter, but there was, no doubt, a -ale negotiatia, deens made and the trade not consummated.

About six months before the death of rames Wood he conveyed his farm of 160 acres with some other tracts of land and the land in controversy here, to his laughter Julia with no mention of any adverse interest in this land and for the nominal consideration of One dollar. He

ac a sid and successful and the shows the size of sometimes these conveyances one flied occupied the devel acres an ald raign, early his as suit to resilif to manet a gr he dade as " stage fait ; absort for bue faet interest in the land, through he lived sear to a the While the record title so this forty that the . DELLE in Junes Wood, with the seasteen of the new it. 11.17 of one of the trunty none tructs, it in : Ultric been understood in the family up to about the time Jamas to live with appellants, that the emitte forty rouge jus. He are intemperate nd ingrevibelonged to William, dent, the land of little remode volue, and attilled all facility sens to have been given it, endept to Leaf ite tenes paid, curing the lifetime of Jours (tool; toth t's trenty agra tracts were lasht with an a winds in sential; Talmodda to infrom an goview affill and paying toxes. statility are incless the leaderstoop and soul mi and after permeter of the alrevocations such amisto And fine there be the temperate and short and their times en la company of the been prepared wass footrope'. versy about this motion, but been one, hi was in and in the first of the state o .563

About in , rabs nefore the limit of interests of land and the interest of land and the lend in congressing sers, to it mughter dulic with no mention of any adverse interest in this tundous the nominal consideration of On acidar.

had two other children and it incidentally appears that
the fact of these conveyances was not known to them or to
William, and that the deeds were not recorded until after
the death of the father, and then a suit was prosecuted by
the other two children to set aside the conveyance of the
lands other than the two tracts in controversy here, which
suit appellants settled, but this land was not included
in the controversy or settlement.

In March 1904, there was made, first; a contract with, then deeds to, one pansel, of the entire forty seres. The contract was signed by William, Julia and her husband on the one part; there is a conflict of evidence is to the negotiations and the respective parts taken by Tilliam Wood and james McEvoy in the same, but no discute that William conveyed the half interest in the twenty actes to which he held record title and received payment for ten acres, and appellants conveyed the balance and received payment for thirty acres, the 1350. The which this suit is brought.

There is ample evidence on the part of appellee, if believed by the Chancellor, to mustain the allegations of his bill that the land was at the time of purchase by James Wood paid for by William Wood and the title taken in his father's name to protect him against his own improvidence; declarations of james Wood to that affect are proven, and while there is also evidence that he told his daughter julia, that William hid not pay for the

had two other oblidmen and it incit stally eppend that the fact of these conveyances are not irrord to then, and thus she deads were not recorded until free the cleath of the father, and than a main and the case of the other tro children to ast deide the orient, and the two tracts in conference bere, with appellants settled, but the locatowers or settled.

In gardh 1804, there we made, first, a contract with, then deeds to, one passed, of the entire tenty remed. The contract was signed by William, Juli end her had her having the conflict of volume had been as to the negotiations and the respective parts taken by allies Vood and games Nobvey in the case, but no discust that whiles nonveyed the half inceses in the arches to which he half record althe and receiver pays ont for ten worse, and appellants conveyed the balt receiver pays and received payment for thirty acres, the bird wallens and received payment for thirty acres, the birds.

believed by the Chanceller, to mustain the allegislans of lie bill that the lend was at the that of another by lie bill that the lend was at the that of another by dense Wood and the title fak a in his father's mans to protect him arches 'in our that another lends; declarations of jence "not to the sind sind start of a proven, and while there is also written to the lend in this diameter is the init

land, that statement being a declaration in his own favor is not competent evidence. There was much business dealing between appellee and his father from time to time and it is quite probable that on an accounting at the time of the death of rames, William would have been found to owe the estate; but however that may be if William in fact paid for this land at the time of its purchase and the title was taken in his fathers name for purposes of convenience he is entitled to the decree rendered; there is no claim that James held the title as security for the The unconpayment of money owing him by William, troverted fact that the family of children, for so many years, understood this forty acres belonged to William, leads strongly to the conclusion that it was so understood and treated by the father. The condition of the record title was discovered by James E. McEvoy about the time he was appointed attorney in fact for James Wood.

There is evidence that tends strongly to discredit
the testimony of William Wood and some of his witnesses.
There was a divorce case pending against William Wood in
1884 and 1885, in which the question of the ownership
of this land was involved, and pleadings and
affiliavits were filed by William inconsistent with his
claim here; and there is evidence tending to show that his
father did not own him \$300 or any other sum when the
first purchase was made, and that William did not
hire the money that he claims to have hired and used

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in the second purchase. Many of the witnesses were not clear in their statements, some of them were testifying Perhaps influenced by interest and prejudice. It is peculiarly a case in which weight should be given to the consideration that the Chancellor saw the witnesses and heard them testify, but aside from that consideration the evidence as presented in the record leads us to the conclusion reached by the Chancellor.

The decree is affirmed.

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Chancellor.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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588) - A-4)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures collowing, to-wit:

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J. J. ES ETELL, There is .

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No. 5881.

Hannah Berg, Administratrix of the Estate of John W. F. Berg, Deceased.

Appellee

VB

Lake Eric & Western Railroad Company and Peoria & Pekin Union Pailway Company,

Appellants.

Appeal from Peoria.

186 I.A. 294

Opinion by CARNES, J.

This si an action for causing death by wrongful act, neglect or default, resulting on a second jury trial in verdict and judgment of \$2500 against both appellants. The facts are that John W. F. Berg, appellee's intestate, was on the 8th day of March 1911, at sleven o'clock in the forencon, in the employ of Peoria & Pekin Union Railway Company, one of the appellants, as a section man in its yards where he had been working for several years. His duty was to clean up and do various things about the yeards. At the time in question he was tightening bolts on a track. He was sixty-six years old, in good health with good sight and hearing, the day was clear and bright. Whi le so employed he was killed by falling between the first and second coached of a passenger train of the other appellant, Lake Reis & Western Railroad Company, a lesses of the Peoria &

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annah Berg, Administratrix of the Estate of John W. F.

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Lake Frie & Western Reilroad Company and Peoria & Pain Union estimate Content,

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1861.A. 294

Opinion by Caruus, L.

white at an action for counting datab by wrongful act, nerlect or default, resulting as a constituty . Add fraing a 0008 to though but bother at faint pellonte. The facts are that John M. W. Porr, appellen led a intestate, we son the Bin day of words 1011, at leven closed in the Corendon, in the emilog of Paprin & Pakin Union Railway Company, one of the orgailmove, ... Tol mailrour assert of sees about the minute on and in the contract of the con seven a years, Wit doty out to old our warform At the time in justice ha . shrany edt tueds spaid! old, in good health with meed as it is in it in the plant of Lallian of begoings on alimit, shilt but resis on Le leite to become and terit est meeted on ilel of L Passenger train of the other appearant, Las Rais & Western Railroad Company, a lessee of the Papria &

Working to make way for an engine of the Vandalia Railroad Company that was appearating in one direction, and
sither while this engine was passing him, or just after
it passed, he came into contact with the Lake Erie conches
going in the other direction. There was a space of about
sight feet between the tracks and about four feet between
trains if standing at the same time on these two tracks.

Pekin Company, wasin control
A pervent of appellant, Pecric Appendict of the
movement of these trains and it is claimed that he was
negligent and careless in ordering the Vandalis engine
to come past and near deceased on one side and at the same
time ordering the Lake Erie train to come past and near
him on the other side.

The evidence for the most part is that the Vandalia engine had passed before the other train was opposite decessed, but appelles assumes it had not and that appellant Peoria & Pekin Company owed deceased a duty not to order two trains to pass in opposite directions on tracks at or near which he might be working. It is also argued that anothing might happened to sound because to full between the cars, and that it may have been that the Vandalia entire equirted steam upon him and cause that to jump backwards, and while there were two eye witnesses to the accident that testified in the case and no proof to that effect except the inference that something mucht have happened, that the jury were warranted in assuming

Pakin Company. He stepped from the trust where his working to make may for an engine of the Tundelia Railroad Company that was affectable. In one direct a, and
either while this engine was passing bits, or just after
it passed, he case into contact with ree late stasts
going in the other direction. There was a space of about
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eight feet between the tracks and about feet that account
frains if standing at the case time on these two tracks.

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account of appellant, Peoria difficulting and that he was
account of these trains and it is claimed that he was
negligent and sereless in ordering the Vendalis engine
to come past and hear decement on one size and ot the same
time ordering the Luke Exis train to ours airs and ot the same
him on the other side.

The evidence for the conet part is that the Vanialia ine had passed before the other train on a possible depends on that appelled a summer of trains to pass in opposite diseasions on trains to pass in opposite diseasions or trains to be working.

It is also argued that

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it, because appellants did not produce the engineer in charge of the Vandalia engine at the time and show by him that it did not occur. Or it is said there may have been chunks of ice and coal on the ground over which deceased might have stumbled, and there was some evidence of chunks of coal and ice scattered around the yards. The argument is, that considering the experience and ability of deceased, something must have happened to cause the accident and that the jury were justified in finding that this assumed something was not the carelesseness of deceased, but was some negligent act of appellants.

An ordinance of the city limiting the speed of passenger trains to ten miles on hour was plead, with the allegation that the Lake Erie train was exceeding that limit at the time of the injury. The fireman on the angine of the Vandalia train, called as a witness by appelles, testified that in his judgment the Lake Eriz train was running about fifteen miles an hour, but on cross examination said he was facing the engine and could not wall determine its speed, and would not say it was running more than six miles an hour; several other witnesses testifying on that question each placed the speed at less than ten miles on hour. The evidence does not sustain a finding that the speed ordinance was violated and at most can only be said to in some degree tend to prove that charge, perhaps sufficiently to compel a submission of the question, if it was controlling, to

An ordinance of the city limiting the special passenger trains to ten mills on annous place, with the Allegation that the Lake Wale train was saceeding that limit at the cire of the injury. The first a tail of the Vandalia train, called to a situase by Tive eded and incorplay of the fact heighpoot , sell TO Jos , tred r. sail. resultit Specia paintment sem mistro orona examination and has been principled and partial an di se ser liss has desge all enimeteh liew ton To live a track of a proof as a collection who maid erom paint to Level; for nois ser tout no priglitest assess acts lie off agent to relik met not seel in be a ar tole Me is a track of golf strend ton the setty of a side of play included as him be tend to prove the classical application of the tend every of brest a submination of the profession of the companies of

the jury by the trial court, who is not permitted to weigh the evidence on a motion to direct a verdict.

Several questions are argued by appallants, and cross serves challenging the action of the court in giving and refusing instructions are assigned and arrust by a pelles. gut if the facts do not make a case of actionable negligence it is unnecessary to consider other questions. is clear that appellants at the time in question were proceeding on the theory that deceased would look out for his own safety and keep out of the way of moving trains and Engines, that there was opportunity for him to do so, and that the accident was not one to be anticipated if he did evercise ordinary care in that respect, and ormet be accounted for except on the ground of inattention of deceased or some wanton act like equirting steam wook him, or someworkent like his stumbling over a temporary obstacle in his way, where is no charge of ilful and santon negligence and no suggestion of any except that the Vandelia engine may have squirted steam on decreased, which we have said is not supported by the evidence, and we need not stop to consider what effect the wilful act of an agent of the Vandalia Company, not a party to this suit, might have if proven. There is some ground for the assumption that deceased may have stumbled on a chunk of coal or ice in hie way and thus fell between the cars; but while it is true that the master is bound to make the place where his servant works reasonably safe and is liable if dangerous obstructions are

the jury by the trial court, who to not permitted to weigh

Several questions are argued by a particular, and process int privit of repossion of molitor sit privasillado arours refusing mornorlens are land ben land one college in the property of -it is facta do not make a case of actionable remitgende it in unnecementy so woulder other quantions, -t -ong eran mitsaup of said sat to ethalized as sant woel . . s e e co èna theory that ledecled rould look att for his by and keep out of the way of moving trains and ingines, that there was opportunity for his to do so, nd that etick e lik ef 1 hris lolann ef of emo for ase inchloct edi ==dinary ours in that respect, and a need to account at and to be at took to wolfnottent to become out no the locks ar to said acte needs ; midulage each for is stundaing ever a terpegal charcoll in his way. on the consider notem has find to egrade on at of any exectt the Vendalts on the any have our o' bine even se diside (besence) no moste mediants of the evil. end we reed met the bid bear sind a T end in dress on the son dillis end , move if smal thirth will will all young a your, gradia tere defi moldicara additel immeng ence al enaff ard) . mr y . - i if spi to food to imple a mo heidmute a with a strain of the local parameter field. -continue that the rest of the continue of the obly and an Hable is 'negerous characters and

permitted to unnecessarily be and long remain in the path of the servant, still we know no rule of law or reason that makes a master liable to his servant, whose duty it is to clean up a yard, for the presence there of stray chunks of coal or ice. It may well be assumed there were such obstacles around the quite extensive yards of appellant, it was a part of the duty of deceased to look out for them and clean them away when necessary. here is no suggestion of any thing unusual in the operation of trains in the yard at the time in question, except the alleged high rate of speed of the Lake Eric train, which we have said was not proven; and if it had been it is difficult to see that the speed of fifteen miles an hour claimed by appelles, could have caused the injury, Deceased was not struck by the engine of that train but fell between two its cars, which would seem no more likely to happen if the speed was difteen miles an hour than if it was eight or nine miles an hour.

The case is in some respects like Belt Ry. Co. v. may
Skezypezak 335 Ill. 242; and it well be said, as in that
case, that deceased had several years experience working
on and around tracks and had occasion to observe the
movements of trains in this yard and must have been
aware of the danger of the situation, "and that it require
constant vigilance to avoid injury". And as said in
Wilson b. I. C. R. R. Co. 210 Ill. 603, "It is a matter
of common knowledge, that work in and upon a railroad yard

The case is in some recessful to the interest of the street of the stree

with numerous tracks, where there is almost constant witch ing of cars and the movement of trains and engines, is extremely hesarious, and ordinary core under such consistions require a high degree of caution and watchfulness to avoid injury. And it is also true as said in Lottker v. Chicage City Railway Co. 150 Ill. App. 69, "A person employ—st in surrounlings of the character which confronts plaintiff at his post of duty is presumed to understand the nature and dangers of his employment when he accepts it by entering upon the discharge of his duties, and to assume all the ordinary hazards of the service."

We are of the opinion that the evidence fails to show that appellants or either of them owed appelles's intestate any duty that was not performed, and that the evidence fails to show oedinary care on the part of deceased at the time of the injury. Many similar cases supporting the conclusion here reached are cited in a nate in Labatt's Master & Servant, 2nd gd. Vol. 3, Sec. 1248.

Two juries have found for appellee and their conclusions are entitled to great weight, but it seems to us
their verdicts rust have been prompted core by that sense

of sympathy and justice that has given rise to legis lation to meet such cases as this, than to a pareful duraid-reation of the issues presented under the law governing the rights of the parties here.

For the reasons stated the judgment is reversed'

Finding of Facts. We find that neither of the appellants were guilty of any negligence of using the fauth of appelled's intestate John W. F. Berg and that he was not in the exercise of ordinary care for his own safety at the time in question.

with numerous tracks, where there is almost constant switch ing of cars and tracks and engines, is extremely hazardous, and ordinary ourse under such consistions squire a high segree of saution and establishes to avoid injury. And it is also true as establishes to avoid injury. And it is also true as establishes v. Chima Olty Rolling Go. 150 III. Ap. 40, 40, 40, 40, and confront of the character witch confronted claims to surroundings of the character witch confronted claims at his year of his emphasment than he assemble the nature and congers of his emphasment when he assemble it by entering upon the discharge of the savings. At the assume antering upon the discharge of the savings.

Te are of the opinion that the arthence falls to show
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conclusion here reached are cited in a note in labutate.

Here & Servant, And wd. Vol. 5, Rec. Limbs.

Two juries have found for soller and their some to us one see ontitled to rest reight, but it seems to us verdiste and their teams to exact

Finding of Feets. Te find that weithou of the life is a set in the second of the secon

TATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Durt, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the hid Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff 186 I.A. S1 1

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5903.

C. L. Roberts, appellant.

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Istate of Henry L. Roberts,

dechaned, a nelles.

186 I.A. 314

Carnes, J.

This is a suit on a claim filed by appellant C. L. Roberts against the estate of his father Henry L. Roberts, isceased; it has been once before in this court on an appeal by the estate from a judgment in favor of the claimant. We reversed and remanded the case and afterwards on a jury trial there was a judgment in favor of the defendant estate from which the claimant appeals. Our opinion on the former hearing is reported in 175 Ill. App. 109, and we need not repeat what is there said.

This record shows the claim as filed in the County Court, it is for "Balance due on open account for money due 736,82. Interest on same 4 years at 5 per cent per annum. 140.36.1

There is no date to either item but the claim is filed July 6, 1911.

On this trial the facts appear substantially as stated in our former opinion except there was the testimony of a brother of deceased that about three years before his death deceased told him he owed Roy (the claimant) quite a little, but didn't say what amount or what for; and the testimony of another witness that in December 1909 he heard claimant tell his father he might need his money in the Spring and his father said he could have it whenever he wanted it . The estate introduced experts in handwriting and much of the record is devoted to testimony on the question of the handwriting of the written memorandum on which the claimant relies

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A seal from Lee,

s of Henry L. Hobsets, engasel. a pallac.

186 I.A. 314

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This is a cut on a claim time is a citain. Derte tjainet the estate of his froher Warry b. Policity . The cataca from a judgment in favor of the cuartant. .. Lift yest a no the cooks and sono sof behave and in the ers were i just mant in favor of the helterial descript from gritted at the second solution to effect the halo all . All' rasqui on Asro e ille (D), App. 1881, or or other line .bisa

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quel Laib, as minio can tolumnit sadric of each as his en-1011.

On this trial the facts should will the this this this Comest opinion ensure viere use the state of a All College Street Print Apple 1817 Taxables to Record lite . (grant in the cold and the cold in the state of the cold in . It tall the to temper that yes thatis but total That is a limited of at any monday meditions to whomle present our manys was aid haven stop in and madealt and lifes were and , of the elasystem of each bloom as block as it is 4 . To leave the printered all altered believes at the Maria ebini tua li malarung adi na ynamidund en besay

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and exhibits are certified here for our examination. It seems to us after examining the whole matter, that the testimony leaves a fair question for the jury whether the memorandum is of any probative force in support of the claim, and that there is evidence enough that it is not, to sustain a finding of the jury to that effect. Without this memorandum, while there is evidence that deceased had been indebted to the claimant insome amount, there is no evidence from which ant stated amount can be reasonably ascertained.

The verdict of the jury should not be disturbed unless there is substantial's error of law. It is objected that the husband of the heir, that has been defending this claim on behalf of the estate, was permitted to testify to a conversation with the claimant that occurred after the death of the father, the objection is on the ground that the witness is the husband of the heir who is defending the estate. He was a competent witness, the adverse party was not suing in a representative capacity and a husband is by statute authorized to testify in suits concerning the separate prop erty of his wife. That the husband of an heir in a similar case is a competent witness, was held by this court in Graves v Safford, 41 Ill. App. 659. There was testimony as to grain, hay and straw furnished claimant by his father in the later years of his life, and various accounts and statements introduced in svidence to show what grain was raised by the father and what was done with it. Claimant in rebuttal offered in evidence the inventory of the estate for the purpose as he stated, of showing what stock and produce there was on the farm at the time of his fathers death. The court sustained an objection to this evidence . It may have been competent in connection with the other testimony on that subject, but it had so little bearing on the real question to be determined

and exhabite are deviated here for our exmedention. The sector to are effect examining the ricels matter, the vive term timent to are standard to a fary shether the case and and and the fary shether the case and and the first of the case and another to the case and the case are called the case of the case of the case and the case are according the case and the case of the case of the case are called the case of the c

The verdict of the jury should not be disturbed unless of tens beset to en II .w. I be worne flattastacks at et of the beir, that has been definite this claim on Af of the estate, was purshited to testify to a comput-In druge each teach the courses that the death in the and father, the objection is on the ground int the retreat is the husband of the heir one is fursing the person. He was a competent tithes the appears the tarty the not not a fac in a representative casses by and . has the ar by the time softeer of besitty in suits own main the seconds erty of his tife. That the husband of an heir to a civil. r acted at rayon off hyd blad and tetatar justanmoo a at e - Safford, 41 Ill. Arm. 608. There was westimone as Lo pating we strain the managed of the total of the fact of the strain of the stra ears of his life, and verious arrows and to sale troduced in svidings on the virily a training of the training I wall a fill if a giver and . At done area now took the restant in swidence the inventory of the saids for the sur ora an La per en la proba e las desta a la galvosa la bedeve el the dark set ter time of his fither is death. The court for the an objection to this within, It we have ended in commedican fith the other terms one on the motors, ... in had so lifting bearing on the roll menting to the or bad if

was evidence of services rendered by claimant more than five years before the death of his father, and the claim rests mainly on those services, and the argument here is that there was an admission of the debt within the five year period of the Statute of Limitations; appellant cites authorities in his brief on the burden of proof on the issue of the statute of limitations. He urges that the court erzed in instructing the jury as to the Statute of Limitations and its effect, not that the instructions are not the law, but that the question of limitation was not before the jury. We do not think the point well taken.

We find no reversible error in the record, and are satis
fied that the verdict of the jury is supported by the evidence.

The judgment is affirmed.

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a find no reversible error in the record, and are assistth that the restant of the jury is announted by the oridence.
The judgment is liftimed.

STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff 86 I.A. 326

186 I.A. 326

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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A service of the property of the

No. 5839.

Edward McCormick,

Appelles,

VS.

Appeal from Lee.

Agnes Downs and

M. E. Fleming,

Appellants.

186 I.A. 326

Opinion by DIBELL. J.

Apelles sued appellants before a justice to recover the price of a colt alleged to have been sold by appellee to Mrs. Downs and had a judgment for \$95, which was the agreed price, if there was a contract. Appellants appealed to the circuit court, where there was a verdict and a judgment for the same amount for appellee, and therefrom appellants prosecute this further appeal.

Mrs. Downs is the daughter of Fleming and, with her husband, lived on her father's farm and her father lived elsewhere. Appellee was a mail carrier, whose route went by the farm on which Mrs. Downs lived, and he had a horse to sell. In conversations between Mrs. Downs and appellee, Mrs. Downs bought the hourse and paid appellee therefor by a colt upon the place, and agreed to keep the colt there till Fall, and did so. About November 15 or 30, 1911, there was a conversation between Mrs. Downs and appellee in which it was proposed that appellee sell the colt to Mrs. Downs for

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186 I.A. 326

Opinion by DIBILL. J.

Apellee and appellants before a justice to recover the paice of a colt alleged so have been est. In appellant the paice of a colt alleged so have been est. In appellant the the appeal of the care and the care and there was a restant that a position as a restant that a paice and therefore a local for the anse amount for alless and therefore a pelless and therefore a pelless and therefore a pelless and therefore a pelless are accounted for further organism.

 \$95 and wait for his pay till the corn on the farm was shelled. Appelles contends that wrs. Downs then bought the colt at that price, Although appellee's evidence in chief did not show that he accepted the final proposition of wrs. Downs, yet when his entirs testimony is considered, it appears therefrom that he hold and she bought the colt at \$95, to be paid when the corn on the farm was shelled. Mrs. Downs contended that appellee required \$95 cash and did not assent to her proposition to wait till their own was shelled for his pay, and that therefore the minds of the parties tid not must and she never bought the colt. A little later the colt sickened and died. There was proof that after Mrs. Downs bought the horse, Flaming aid he would pay for it or see it paid for, and that after she bought the colt he said he would see it paid for, and it is truly contended by appellants that Fleming is not liable upon those as original promises, because, standing alone, they are to pay the debt of another and are not in writing and are void under the Statute of Frauds. But there is evidence in this record that Flaming, on or about November 3, 1911, told J. R. McCormick, the father of appellee, that he owned the colt and that Mrs. Downs had no right to trade it for the horse; he did not wish any trouble in the family; and that Flaming then requested J. R. McCorntek to tell qualles to sell that colt back to Mrs. Domns and he would see it paid for; that J. R. McCormick did, within three or

(95 cmi wait for his pry till the corn on the time and obslied. A palles contents that are. Donne then bought the cold of the price, the harden or realest unit ladigaces at this made done bib laddo wit care wive First proposition of ers. Bours, yet it entits entits tion of the design of the property of the state of the time of time of time of the time of and the bought the walt to \$85, to be paid when the carm on the form was shalled. For me contanted in t red of Anguar for his bus dags of baringer estingue proposition to wit till their or sheller for its gay, and thet therefore the winds of he perties the not enoted . the never bought the ockt. old intel statil t colt sickemed and died. There as your wint with Mrs. Down bournt the horse, Florier sights raid pay for it or ese it paid for, the that eller also bought the colt he said he would see in paid for, and in it fruly contended by appellants that pleasing is not liable up on loss is original routees, rectuse, remain q Come, the care to july the lebt of unother and are not in tof the confidence of the Platers of Francis. To about the evidence in which record that Timing, on or out forenber b, 1911, all d. d. Hoden tot, La falls for mice sit here of this ealisque to wented Mrs. Downs had no rankt to track the ear the hards that is did not will a strongle in the family; and this Pleming then requested J. F. in Comini to tail . , alles to sell that doubt had been Doung of he would see it puld for; that J. P. McCornian itd, within three or

four days, convey that request and promise to appellee, and that appelles about two weeks later had the converastions with Mrs. Downs in which he sold the colt back to her at \$95, to be paid at corn shelling time, and that he did so in reliance upon the promise of Fleming, which had been so communicated to appellee at Floring & ... request by J. R. McCormick. If this evidence is true, then this was an original promise, and Flaming is hiable with Mrs. Downs, and the Statute of Frauds does not apply, and the subsequent promises by Flaming were but reiterations of the fact of his liability. Fleming denied this after a fashion, and testified that, if he did say that on or about wovember 3, he must have been drunk, but when all his evidence is considered, he did not make an unqualified denial. It was for the jury to decide whether Mrs. Downs did buy the colt from appellee for \$95 to be paid at corn shelling time, and whether her father, Flaming, had previously sent word to appellee to sell back the colt and that he would see it paid for, and whether that word was communicated to appelles before he sold the colt to Mrs Downs, and was relied upon by him in making the sals. The third instruction given at the request of the defendants to concede the liability of Flaming if the proof established those facts. On all these questions the evidence was conflicting and the jury might have found the other way. But the jury believed the witnesses forappellee and the trial judge approved that finding.

We cannot see the witnesses nor hear them testify and cannot say that the jury should have found the other way nor that the trial judge should have held that the evidence did not support the verdict. We find no serious error in instruction No. 2 for appellas, of which complaint is made, and appellants! 6th instruction. which was refused, while perhaps strictly accurate, was calculated to make the jury understand that even an iriginal prosice by Fleming must have beenin writing in order to bind him. We are of opinion that the jury were sufficiently and properly instructed. It is obvious that the position fo appelles has a meritorous aspect. He parted with the horse, which has been paid for only by this colt, and he never took the colt away. colt had not died, probably no controversy would have arisen. It is clear that before the colt became sick, appellee and Mrs. Downs did negotiate for a sale of the colt it Mrs. Downs at \$95. The real difficulty as to wrs. Downs is whether appellee said he would wait till the corn MMMIIMM was shelled and thereby closed the contract then, or whether he went away without announcing that conclusion, and thereby left the roposed contract unclosed. As already stated, at one place in his testimony he failed to make the answer which would shor the contract closed, but apparently this was merely an omission to complete the narrative, and elsewhere he

Eng wildrest and meet you see entire add see formus eW reado add loaci er if balged ming and test was formed saf that the the color of the safe that the transfer of the the transfer of th evidence did not approve the vertion, We ind no serious error in intetraction No. E Por appelles, of thick our-Maint is made, and oppellants! Oth instruction, which nas refused, while parings abrickly accumule, .. a calculated to take the fary understand that even an driginal progles by Fleeing and boards writing in order to that him. "sees of spinion that the jury ware sufficiently and properly instructor. It is chylans "Judija approbliten a and salasegue of moddle og edd dedd Ter porter with the horse, which has no make retrieved as by this colt, and he never took the daily. If Can soit had not died, probably no controvery and the placed and the address to the mester of the end to ella mult esmidoren bib ammon lary bas salisque cold a reaction was said . The real Arritoner a su eds Lil sin Elm. and than solley a restress of a mod .an ena i unio y apadi tra. Nedlana auro Corn MARKERE contract then, or whether he were easy think to ment takensing that concursion, and thereig inde the property of emth of As linearly others, at the place to be that wis fact a model that course this take of falling so your total contract closes, but a purently of the second sometimes oulasion to complete the narrative, and element a remied that. On motion for a new trial an affidavit of newly discovered evidence was presented. It tended to support the evidence of Mrs. Downs, but was not conclusive. It was by a relative, who claimed to have been present at the time appellee cays he sold the colt.

t was at least careless that she did not remember or ascertain the presence of that relative before the trial.

The judgment is affirmed.

thut. On motion for a new trial is ifficivity of discovers; evidence was presented. It tended to it. In the evidence of yrs. Downs, but was not continued to have it was by a relative, who disinued to have reen present at the time opposites may he would the colt. It was at load careless that she ded not remember or assertain the presence of that relative before the

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. M 86 I.A. 327

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5844

W. Heller and Sons, appelless

VS

Appeal from Peoria.

Illinois Traction Company et al

aprellants.

Dibell, J.

186 I.A. 327

Appelless deal in metal, scrap iron and junk. One Vance was purchasing agent for appellants, the had a surfaced of metal or junk at Decatur for sale. Samuel Heller one of the appelless, injured inquired of Vance dut he had to offer in the way of such material and was told that he had a car load of junk at Decatur for sale. S in amelies went to the office of Vance and was firmished with a paper showing the diffetent kinds of metals in said car, namely: brase, comper, white borings, yellow borings, brase and iron copper and iron, and the number of pounds of each kind. Heller inquired what the white borings were and Vance was umbale to state, but told him to c to Necatur and inspect the white begings so that he would know exactly what they were. Heller sent one of his partners to Decatur and the latter inspected the white borings and saw the carload of metal , and then Heller gave Vance prices per pound which he would give for the different kinds of metal specified, and after some delay in an effort to get a better bidder, that offer was accepted. Ampelless bought said carled of metals and paid the prices they had offered for the weight of each kind as specified in the memorandum, accounting in all to 4,040.80. When appelless required the carlord they Weighed the different metals as unloaded and found a a all Count of shortage in weight on several items, but sen orally found that there was very much less "brass" than the bill appendica, and there was a very much or ster will to the item of "brase and eron". They had paid eight conte per pour!

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1861A. 327

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Appelless donk to rend, sorre tron and june. in Vince was percentage e out for authorized and some of matal on junk at terestry for oaks. Six sol Haller ad law eco. I to herispat immaget reelleggs and to ell that his are her industry done by now will up both; or had wad a car load of funk at Decembus for sale, Osi e musice we she office of Vance and we functions wath a caper of wing the distancent winds of metals of the city and, meraly: Lears, corres, white busings, yellow lateres, have to inco . Inti leas to absure to recomm old has another to pro-Der sonel har ever sonited etido edi teda kiringal a insured to state, but told him to jo to I remur and inequet west fair afform word bloom and that on synthod stide ers. Heller sent one of his pertuers to Ber tur and tinis college of war has agained other and beforgant to the mile inempire saing sourt eve rell Historians , and . nation of fare is about the safe and and arty bluer end after some delay in an aftert to an attendence to the Lat into it a differ the analysis. A selient total of a selection is i sa su n'i bonell'o uni venir esoène elli bing bis al of each bind an epocifical in mile of the high, mountained in wil to it, 010.80. Them appointed secretary of cusion of the Il a a principal to the color of the act of the color beneated eliginous for post Linguis as higher at statute. In amount ATTACANT AND THE PARTY BOOK STORY THE WORLD PARTY LABOR. will be Pipler Serborn over my a new amid the plettings the of "trave out trace," the unit tool slight outs not o for the "brass and iron" and ten cents per pound for the "brass", consequently the appellants had been paid more than the exterial came to at the agreed prises. Appellants sued appellants to recover the amount of the over payments, and had a verdict and a judgment for \$305.88 from thich defendants below appeal.

Appellees proved the amount of shortage on such of the items and that the difference between what they did receive Am what they should have received at the rates named, andunted to \$305.82. There was practically no dispute as to that fact. Appellants concede that, as to three of the items, they are liable for the amount which was paid for and which swellees did not receive. The principal chortage in Weight however, was on the item of "brass" and there was an equal amount of weight in excess on "brass and iron", and appellasts contend that they did not marrant the brass to be free from iton and therefore that part of the recovery was erreneous. By the ritten engrandum, a callant cold a college 23545 pounds of brase at ten cents per pound, and, in our opinion, were bound to deliver that quantity of brase. Appellants could not fill this with "brass and iron" which they had agreed to sell at eight cents per pourd. Appellants ergue that appalless cannot recover this shortupe hecause one of the appellees inspected the carload at Decatur. All that the inspection was for was to ascertain what was meant by "white borings". He had no opportunity to ascertain the weights of each kknd. The retal was at that time all loaded in a mass in the car. The principles governing ible case are stated in Columbia Iron Works a Dow lass 33 L. R. A. 103 and in that portion of a note found in 35 L. R. A (N.S.) on p. 291. It is contended that the instructions are incorrect, and it may be that they are subject to some exi

ocnse meterial came to at the agreement per pound for the consequently the agreements had been reid nors an test meterial came to at the agreem of the over payments.

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and the lives are applyingly by Propose and Persons Bald Book items and what the difference between whee they life moreove and what shay should have received as the united a red, accounted to 1305.88. There was reservedly no discuss as to dad face. Annallance concede that, as to three of the acure, doin' has not they are doin't favour wir not eldeil ere velf idgiow at egatrod legitaing eff .evicors ton bit a ---Asupe as out such the Memors to me it and the state of -long har . "nout has search no assess at thinks to tarous seri of us seein oil therraw see hit year that hestmos -us and quevosous sid to tun; tant explored fore noth nor concous. By the rathtenegrorundum, regulants rele repollers north mounts of large of tem cente gen round, and, in our a, ware booms to deliver that committy at break. At make graf Antingral transcript did sidt 1110 den tlade s removied to seek the street of the seek of beek RESIDENCE ADMINISTRATION OF THE PARTY OF THE PARTY OF THE PARTY AND ADMINISTRATION OF THE PARTY .zuf.b f for Arrisec and Garbecart poulleres dr ingparatom on a regression regiment that man word by Trutte buringer, Be had no organizated attent you therethe the verigities of cost that. The this verification of lowing im a rung in the car. The run and the addition I ET same street in Colombia from Your are included to . . 105 omits that postion of a role dommit is of a. on o. the as cortenied that the concentrate as war e ou al lenider are yest work as you se her . Joe wood

ariticism. But under the evidence, no other variest could have been returned, and we are of the opinion that the judgment should stand, regardless of the instructions.

The judgment is therefore affirmed.

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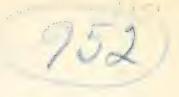
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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 186 I.A. 325

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

CONTRACTOR OF STREET

THE STATE OF THE S

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No. 5847.

Alma Shurlow,

Appellee,

VS

Lester J. Hoadley,

Appellant.

Appeal from La Salle.

186 I.A. 328

Opinion by DIBELL, J.

Between eight and nine o'clock in the evening of July 6, 1910, when the moon was not shining, George Shurlow was driving south on the west side of a street in the city of Earlville in La Salle County, in a top buggy with the top down, and his wife, Alma Shurlow, was riding with him on the left hand side of the seat, carrying a babe in her arms. Lester J. Hoadlay come up behind this buggy, driving an automobile owned by him in thich were several other persons. He turned out to the left to go by this buggy and struck the hind wheel of the buggy with has right hand light and "dished" the wheel and that corner of the buggy went down to the ground and Mrs. Shurlow was injured. She brought this suit against the owner and driver of the automobile to recover damages for said injuries. She filed a declaration containing three counts and during the trial filed an additional count. Defendant pleaded the meneral issue to the three counts and it was stipulated that it should stand to the additional count and that all defenses

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For Dint. A SHITTER ST. - sater J. Hondley, . Frailbeg.

Appeal inc. La Salla.

186 LA. 328

opinion by DIBELL, J.

Detween eint and mine o'clock in the overion of · 1ly 6, 1910, when the moon os not whining, George ni trevia a to shis tanu sait no ditica gairinh asw noin got s si janua O sliss al al ellivius to ythe agy with the top down, and his wife, Alma Charley, was -years, tuse od to shis hand thei add no mid driv pull ing a babe in her arms. Lester J. Woadley come up sind this buggy, driving an automobile owned by him in edf of two hemms ell . Lin were sevenil other persons. sat to leady buil odd serve han appeal abid of og of the. lead and "hadath" has sight hand their and ditty year! and that corner of the burgy ment down to the ground and Wes. Shurlow was injured. She brought tills witt spainet reveren of allowatus of the rationalis to recever danages for said injuries. She filled a declaration on to lil I this ent metant has atmos send pulatofut timede the three counts and it was attract that it chould eseasted lie and bun tamoo isnoitibbs edt of Letter

could be introduced under said plea. The first count
was trespass vi et armis and apparently the proofs made
no case under that count. The second count charged
that defendant negligently caused his attomobile to
collide with the buggy and thereby plaintiff was injured.
The third count charged the duty of defendant at that time
of the night to carry two lighted lamps showing white lights,
visible at least 200 feet in the direction towards which
said motor car was then proceeding, and that defendant did
not have such lights, but negligently and unlawfully ran
his automobile without the lamps bequired by lawind
negligently ran into the rear of said buggy and thereby
caused said injuries. The additional count was to the
same effect. Mrs. Shurlow had a verdict and a judgment
for \$2,000, from which Hoadley appeals.

headlights, and with two kerosene lights a short distance back of those and on the side. The acetylene lamps were not lighted. The kerosene limps

were burning. Appellee contended that appellant did not have lamps burning of the strength required by law.

Appellant contended that his lights completed with the statute. Appellee's proofs tended to show that when the collision was over, she was seated on the front tale between the left front wheel and the buggy box and facing north.

Appellant contended that she was not out of the box of the buggy until she was assisted to alight. The babe was

The automobile was provided with two acetlene gas

tractues wistensia and apprently the proofs and a tractues of tractues wistensia and apprently the proofs and case under that ecunt. The second count charged that defendent negligabily reason his afforable to polities with the images and thereby plaintiff wer injured. The third count charged the daty of Jefandart to that the of the night to carry two lighted lamps countag white lights, when the aleast 200 feet in the direction towards which had noter car was then proceeding, and that lefondant did noter car was then proceeding, and that lefondant did to subsmobile without the lamps bequired by in a subsmobile without the rear of cald language and thereby negligently was into the rear of cald language and thereby and injuries. The additional count was to the selfect, here. Shurler had a verdict and a judgment

The autemobile as provided with two sostlens pix beddights, and with two herosone lights a shart discussor the wide. The speciens large

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re burning. Appelles contented that appellant lid not see lange burning of the corenge's required by law.

Appellant occessored that his lights conclided with the ute. Appelles a proof carred to circ that that the chart to circ that the that the horse contine the front and the burge how and froing north.

Appellant contended the contended the burge how and froing north.

Appellant contended the contended the case of the burge how and froing north.

unhurt. Appellee was treated three times by a physician for bruises. Long afterwardshe was examined by expert physicians for the purpose of this trial and they discovered a broken rib and a floating kidney, which appelles attributes to this accident and appellant denies were produced thereby.

These expert witnesses were permitted to testify for appelles, over the objection of appellant and in answer to hypothetical questions, that, in their spinion, the fractured rib and dislocated kidney were due to this secident. This was one of the questions to be determined by the jury. Appellee's proofs authorized the recovery of slight darages only, unless the broken rib and floating kidney were caused by the accident. If they were, then she was entitled to substantial damages. The law does not permit the opinion of an expert witness to be given determining the recipies point to be decided by the jury. It would have been competent to prove by these physicians that in their opinion this rib sould have been broken and this kidney dislocated by an accident of this character. I. C. R. R. Co. v. Smith, 308 Ill. 608; Keefe v. Armour, 258 -11. 38, and cases there cited. The ruling was erroneous.

The fourth instruction, given at the request of appelles, stated the statute of this State requiring such motor vehicle travelling upon a public highway during the period from sunset to one hour before sunrise to carry

i . Appelled was tracted three times by a physician tox bruises. Long aftermardsche an exeminat by expert physicians for the purpose of this trial and that and the constant of this are pro-

These supply of harms were assembly despite and of posted, over the chiestion of appallant and in anauer . Jotherical quantions, thet, in their epirion, the widt as sab ever yenilt befacolath has dir bermian addens. This was one of the questions to be daterminoil hesirodine shoon; o'pellengh . yout suit yo'i into the manufact discounty, welcome the broken min and guit ti . inclience of the accident. If that .sepansi inicretenge to beitting one edi sedi or arassist integra as to spirity, edd thang too seed wal edd e five determined the printer to be healtest is jury. It swill have been oberet made yround by stalida a (in a file acide, printe, plate al parte emphaismic e de La maliet en en indunciale gerhal wide bue mederad o The character. I. C. R. R. Ce. v. Saleh, and Ill. 1008; shall wind and to the old the will several to wheal LAUGHTHAN AND STREET, MAN

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two lighted lamps, showing a white light visible at a distance of 200 feet in the direction towards which asid motor wakieds vehicle was proceeding, and instructed has jury that if they found from the greater weight of the eviasnce that at the time in question appellant was driving his automobile on a public street in the same direction that the carriage was going in which a pelies was riding, without carrying the lights by said statute, in the night time, and that while so ariving his automobile he struck the rear of the carriage in which a perise was riding and broke the same and threw appellee out of the carriage and injured her, as alleged in some count of the declaration, then they should find appellant guilty and assess appellee's damages. The fifth instruction, given at the request of appelles, was in substance the same. Each of these instructions was erroneous. They did not submit to the jury the question whether the failure to comply with the statute caused or contributed to the injury. The mere fact that appellant violated the statute, if he did so, gave no cause of action, to appellee. must have been injured because he violated the statute, in order to give her a cause of action for his violation of the statute. A violation of certain other provisions of the motor vehicle law is by statute made prima facie evidence of certain things, but there is no such provision in the statute in relation to the failure to carry sufficient lights. This instruction ald not submit

s as eldisiv totil ation a polyone, agual betaril on: Mina Abida cirenci acirectio edi ai Jeel COG le echetali vehicle was proceeding, and instructed RÉBÉRE TOUT of the that if they leand from the granter weight of the evidence that at the time in question appellant was -forth suce sit at feerte ollder a no slidenotes al i gaivina swing a doller of motor was spatters wer safe and sidisg, without cerrying the lights by cald statute, in allowable all polytel or allow both hom , and fright add as asilegry dolaw at enginees and to appropriate to this and broke the sens and three supelles out the dutalists and injured has, so alleged in some count of the declaration, that they should find appealant guilty Lesystel a settleype acress him WINDSHAE SPIES AND place and constraint of the problems in compact of its setting . oh of these instructions was an oneous. for bib your of equilible and mentionic moiscoup fedd was ent of fludue conly with the charate emacal or contributed to the injuny. and for thet specificat violated the attention if Lat so, yave no cours of action, to supplies. ni ,espense who becaloty of asmood bermini meed or the order to give here course of section for his vicustion of A violation of deriain ether provisions . 932323 Bis of the motor vehicle has in by stylints made rima frois evidence of certain shings, but there is no such gravision grand al similar ent of acidaler al sights ent al wifilelent thinks. This assessment in think

to the jury the question whether appellant operated his automobile in a negligent manner as charged. In effect, this instruction told the jury that if appellant did not carry as strong a light as required by statute, then for that reason alone appellant would be liable to appellee for those injuries. In our judgment the errors hereinabove pointed out require the submission of the cause to another jury.

Several other things require a sationing, that they may be avoided upon another trial. Appellee, over the objection of appellant, succeeded in getting before the jury the poverty of her husband, and an appeal was made to the jury in behalf of "her little family of children."

The latter remark was withdrawn, but the effect was likely to remain. Appelles was not entitled to windicate damages, but only to compensation, and that would be the same whether she was rich or poor and whether she did or did not have children. The natural effect of this proof and of this remark would be to produce sympathy for her in the minds of the jury. Appellee's counsel, in addressing the jury, sought to cause the jury to look with suspicion upon the instructions to be given by the court on behalf of appellant. We consider such a course of action improper. J. J. & J. R. R. Co, v. Otstat, 312 Ill. 439; Mothersill

lemebile in a negligant namer as charges. In sirect, temebile in a negligant namer as charges. In sirect, tem for a season alone inpeliant rould be liable to appelled to a recommendation of the ambutesion of the land out require the submission of the land out.

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THE PAST CREEK PLANT OF STREET BEET ROOM AND THE LANGE OF THE PARTY AND THE objection of appellant, succeeded in getting before the Allen are Livery on Last American and he opposed will been a. a fury in behalf of "her little faulty of oblidars." se letter recert see withdrawn, but the effect was of lefelone for any entleggi . sly to remain. thrate domagnes, but only to sommenostion, and that The roug me doing are she recised and edd ed Large and the set have children. The arterial of all blum dramer cill to have loving sidt to the the os sympathy for her in the minds of the july. . Jusy . look with anapiolon upon the instructions to be given by the crust on behalf of anythent. We estridar such a ocurs of action inproper. J. J. ? de he he co, w. staying, his pit, one , mellorediti

v. Voliva, 158 Ill. App. 16. There was other like courrence during the trial. In many cases the court tustained appellant's objections, but we are of opinion that the evil effects of these improper things were not likely to be removed from the minds of the jury.

The judgment is reversed and the cluss remarked.

There is ther like of the set inproper things to the set of the set of the court of

STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

5860

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 335

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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John DUAMS I. CHINTEL Freshman, Indiana.

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SEPERATE, TRUE ESTERNATION ROTTELL OR AN INC. TO SELECT THE CONTROL OF SELECT THE CONTRO

Gen. No. 5860

Daniel Donovan, appelles

Appeal from Co. Ct. Lee.

John Ingoldsby, appellant,

Diball, J.

Donovan sued Ingoldsby in the county court of Lat County 5

and filed a declaration containing a special count and the common counts and afterwards filed a bill of particulars and afterwards filed additional counts. We think it sufficient to say of the special counts that they stated a valid cause of actionagainst defendant. He filed a plea of the general issus and a plea of the statute of Trauds. A jury was "aived and the proofs were heard and plaintiff had a judgment against defendant for \$261.50 and costs, from which defendant below appeals.

The proofs introduced by appellee tends to show the following facts. James F. Daley and Alice Daley were husband and wife and were residents of Lee County. James F. Dailey owned considerable real estate in Lee County, upon which there Ders mortrages and upon which judgments trainet him were liste. He conveyed this real estate to Alice Daley upon an expressed consideration of \$5,000, but the real consideration was an agreement by her that she would pay all his debts. One of those debts was a promissory note, payable to the order of appellee, signed by James F. Daley and J. B. Clears, dated May 12, 1903, due one year after date, for the principal sum of \$200 with interest at six per cent per annum. Daley died soon thereafter. Mrs. Daley paid interest on this note up to May 13, 1908. She sold some of the real estate which her husband had conveyed to her and with the proceeds paid off judgments which were liens on the real estate. She expressly promised to pay this Donovah Note as a part of the consideration or the lands. She became very ill and was in the hospital and sent for appellant, who was her brother, and

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- chich is worke to the testing to be the testing the lice to all in include facts. James F. Daley and Alace Raley were hasbar . a. list and were recidents of Los County, June 1, Builey a mil onaiderable real estate in Doc County, a on bloa Chara arti tie odnika in i nadoh jolgronia sariasi nin asperana. The conveyed this real cotate to Alice Caler and an areal on theretion of the out the real countries are in and . . with the first out of the pay did have select for of .. ជ ថៃ: ១៨ ជាស្មាញ រួមសុខស ស្គង។ ស្គង។ ២ ដែល ២៨៨៩៦ មុខ០ 🕩 alios, signed by Junes V. Poley ord J. D. Clook, J or A . . The . Total test than test mis is in it with After OCE! a therefiter. Hre. Wiley wild innepert on Units stantage of 18, 1808, She cold care or this much saudte inc. . t - Para tong the tong consists and and of beginned had best plantente en est tre Laguren de antil econ dottin attent omissed to pay this Domestal Lots or a part of the start? TOY ER the Linit. The bearing was the under the one , we do not not not that large not the car in the ere

proposed to convey to him the remaining real estate, in consideration for which he should pay her debts, including the debts of James F. Daley. He made inquiries into the equity in the lands over and above the mortgages upon them and found that it was some \$6,000 or \$7,000. He accepted her proposition and she conveyed the lands to him. This particular note, due to Donovan, was one of the items which were named to him and which he agreed to pay, as also a small bill of \$2.37 on an open account. He paid various debts owing by Mrs. Daley inclosing for s debts which were originally a ned by James F. Dalsy. Through his attorney he offered to pay the principal of this note, but refused to pay the interest. The evidence introduced by sppellant tended to show that all he agreed to pay for the land was the mortgage indebtedness and to take care of his sister and to furnish her burial. The evidence seems to preponderate in favor of appellee. If the trial judge believed the proof introduced by appellee, appellant was liable for this debt. The trial judge did nelieve these witnesses, and it is impossible that we should say that he should have disbelieved them and should have believed the witnesses introduced by appellant.

It is possible that the rulings of the trial court in admitting evidence for appelles were not in all cases correct, but the law is that where an otion at law is tried by a judge without the intervention of a jury, the admission of incompetent evidence will not be ground for reversal, if there is sufficient competent evidence to sustain the finding.

Palmer v Meriden Brittania Co. 138 Ill. 508; Iroqueis Furnace Co. v Elphicke, 300 Ill. 411; Grand Pacific Hotel Co. v Pinkerton, 317 Ill. 61, and cases there cited. It is clear that this record does contain competent evidence sufficient to support the finding. We find it unnecessary to uncumber the

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record with a detriled statement of the evidence of each witness. No propositions of law were presented.

The judgment is affirmed.

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STATE OF ILLINOIS, second District. second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the aid Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 347

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Ben. No. 5867

William F. Mehlenbeck, appellant,

VS

Appeal from Peoria.

John Steitz, appellee.

Dibell, J.

86 I.A. 347

Appellant sued appelles before a justice to recover a loan of \$50.00 and had judgment. The defendant below appealed to the circuit court, where, on a jury trial, defendant below had a verdict and a judgment, from which plaintiff below appeals.

Appellee was about to go to Florida with one Nichols, and Nichols had promised to furnish him \$100 for the trip, Aspellant tentified that appelled called him up over the telephone, and arranged that appellant amould lo in appellant 50.60 and that appelled and Michels set at appellant's shop and appellant loaned appell s "50.00 and Nichols 'unnished some additional money. Nichols testified that he did not arrange with appellant over the islephone, in the not borrow the coney from appellant, but that it was borrowed by appelled and he added \$10.00 to it. Appellee testified that he did not converse with appellant over the telephone on this subject, and that he did not borrow the "50.00 from appellant; that he and Michols met at appellant's shop, and Michols said that he was unable to get the roney that he had promised appellee, but that appellant would help him out, and that appellant counted out "50.00 and delivered it to Wichols in. Wichols added 10.00 to it and purhed the 60.00 scrube the table to appelles, and the latter took it, and that he did not borrow it from appellant. Appellee also testified that he had since paid Nichols the \$60.00 but this was excluded. Appollant contends that he had the preponderance of the evidence, and the verdict should havebeen for him, and

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William F. Habisakask, appelhing.

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the court should have awarded a new trial. We perhaps would be better satisfied if the verdict had been for appallant, withough the testimony of appellee appears to us more straightforward than that of appellant and Nichols. But it does not follow necessarily that where there is one witness on one side and two on the other the jury must believe the two in preference to the one. The jury may have seen that in the demeanor of these witnesses on the stand which caused them to believe appellee, Maggart v Peoria Ry. Co. 179 Ill. App. 229. We can only set aside such a verdict when we can see that the verdict is manifestly against the weight of the evidence. I. C. R. R. Co. v Gillis, 68 Ill. 317. Lourance v Coodwin, 170 Ill. 300. Chicago City Ruilway Co. v McClain 211 Ill. 589. Donelson v East St. Louis Ry. Co. 335 Ill. 625. The trial judge heard these witnesses, and refused a new trial. We cannot say that it is clear he erred in so doing.

Appell nt contends that the court erred in instructions given for appelles. Appellant moved for a new trial, and filed written grounds for the motion, and fid not include in said written grounds any reference to the action of the court upon the instructions. Under such circumstances, he is confined in this court to the second specified in riting, and has waivedall others. Matthews v Granger, 196 Ill. 164. Yarber v C. & A. Ry. Co. 335 Ill. 589. Section 81 of the fractice Act, is spended in 1911, obvious the present y of an exception, but does not affect the rule laid down in the cases just cited.

The judgment is therefore affirmed.

the court should have a maded a new iniel. he secknys would the contraction in the first test and the definition rested at although the tentimony of semiller a means to us more eithint for reon to 1. A . slowest has tablesone to take that br. tol ing no escaptive end of ered; ereds told without on the side and two on the sther the jour rack tall so our har edie in preference to the one, that jury any have then that in beento diside duties with no estoanthy exect to ronsemble off them to believe appelles. Magnert v Parvie By. Go. 178 Ill. App. 189. We can only set seits such a verfirt when we can to thrie out termina vitaelinem of tolbrev out tail out the stillions, J. C. I. I. William and Till 12, Leasing divin, 170 Ill. 300. Chicago City Emilysy Co. v Hodista 14 .41. 582. Pom lacm v Toot St. Boude Ry. Co. Tad L.E. 305. The trial judge heard these virusoses, and reluced a new rial. We cannot say that it is clear he erred in to drine.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois. and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 355

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Frank P. Hawkins, et al,
Appelless,

vs,

Harry L. Taylor,

Appellant.

186 I.A. 355

Appeal from County Court of Lake County.

Opinion by DIBELL, J.

This suit was brought in April, 1913, by Frank P.
Hawkins and Richard W. Hawkins, partners doing business
as Frank P. Hawkins and Company, to recover a commission
from Harry L. Taylor for the sale of certain real estate
belonging to Taylor, located in Highland park in Lake
County, Upon a jury trial, plaintiffs below recovered
a verdict and a judgment for \$150, from which defendant
below appeals. In addition to the verdict for that
smount in favor of plaintiffs below, the jury also returned
a special finding that plaintiffs were the procuring and
efficient cause of bringing about the sale of the property
in question.

Frank P. Hawkins and Richard W. Hawkins are engaged in the real estate business in Highland Park in Lake County and have been for many years. Harry L. Taylor, appallant here, lived in Highland park and owned a house and lot there. In June, 1918, appellant put this real astate in the hands of appellees for sale and named a price for which he would sell. Appellees showed the premises to various persons, and among them one Charles F. Drake.

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MARY LA VILLEE,

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To June, 1918, well-and to the hands of a control of the c

Drake and appelless had various interviews regarding the proposes deal, in the course of which the price asked by appellant was mentioned, but appelless never succeeded in concluding the sale with Drake, Finally, in February, 1913, Drake told appelless that he had been to see appellant personally and that they had come to terms and had executed a contract of sale. Appellees never received any commissions on this sale from appellant and upon failure to do so, brought this suit. Richard W. Hawkins, one of appellees, was the only witness for them, while Drake and appellant were the only witnesses for him, and there are numerous contradictions in their testimony. Appellees claim that they told appellant they were negotiating with Drake for the purchase of the property; that they knew n nothing of any negotiations between appellant and Drake directly until after the contract of said had been executed; that appellant never told appellees to do nothing more about the sale of his property; that appellant later told appellees he needed money for other purposes and would reduce the price he had asked at first by \$500; and that, when Drake informed appellees that a contract of sale had been executed, he told them he thought they were entitled to a commission from appellant and that he, Drake, would helpthem to get it. A pellant claims that he told appelless they need do nothing further in the matter soms time before he entered into negotiations with Drake. He does not recall whether or not he told Drake that he would take care of appelless in the matter of commissions.

Desir and a well-se but werkens in services a trop edeath go for a local, in the course of this first send by mi : An erge of wer seelfegge that Lengthew and theliegge Sensiting the sale with Drake. Finally, in Fers. sy, hatmane had a manner of each and year field has yellow may -BI SA LANDON THAN INCIDENT DATE OF TAXABLE ob of smalled we a limit facility of a we shad shall no small the tice air't ddrumae . . Richard W. Verhine, ors of relieve, and the only thouse on them, while Freke and a on this ware the only whine to the they and there are srmedil d'alade di anotipilerance escare THE BUTTER THE BUTTER THE PART AND ARE SHEET BUTTER. and the free following a first property of the first and said silan we do they a common moifedtopun ya in gair to -ture to need to it is a first decision will notice it is the pulls at a aroa ili Direce ed lectione e for reven decilen a desir ple Duck to the intellege daily sydre one said to shor said doeds in it is given with all the tester but of color out combo . of sine to de whice a such escape of memorial same and the court of the load that the the tract of the state I a comident on from appaint to that he, Drais, weight bire at the smiche terfile, & will day of money well appoint of the second of the contract of the c time before an enterior of the level of the said of the Line . wi de 'r edwall blad ad dan no naddade filepan don saob . Antiuris on to nestan eds ni selleggs to erso so He also claims that he did not know that appelless were sugged in any negotiations with Drake for the sale of these premises.

In view of the above testimony, appellant claims that the prependerance of the evidence was clearly with him and that the verdict of the jury was against the greater weight of the evidence and shouldnot stand. We are unable to agree with appellant in this contention. The fact that two witnesses testified for appellant and but one for appelless does not necessarily require that the jury should beliave the two in preference to the one. The jury may have seen that in the demeanor of the two witnesses for appellant which caused it to put less confidence in their testimony than in that of appelless one witness. By denying the motion for a new trial, the trial judge has approved the verdict of the jury and we can find nothing in the record, that would justify us in holding that the action of the trial judge, in upholding the verdict, was erroneous. Maggart v. Peoria Ry. Co, 179 Ill. App. 239. By their verdict and their special finding, it is evident that the jury considered that appelless had been authorized to bring about a sale of appellant's property; that they had gone about that matter diligently and had shown the property to different prospective purchasers of real estate in that vicinity; that they had mentioned to appellant the name of Drake as one of such prospective purchasers; and that they were still negotiating with Drake Resided circles that he wid not know that appealings for the interpretations with Deales for the rank of

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and were endeavoring to persuade him to rurchase this particular piece of property when appellant entered into direct communication with Drake upon the same subject and consummated the sale. There is evidence in the record to justify the jury in so believing, and the jury are the judges of the facts. If appellees were the procuring and efficient cause of the sale, as the special verdict found, then appellees were entitled to recover, through the owner completed the negotiations.

Rigdon v. wore, 336 Til. 382.

Moreover, the abstract does not show that the bill of exceptions contains a motion for a new trial, and hence it does not show that the sufficiency of the evidence to support the verdict is presented by the record. Yarber v. C. & A. Ry. Co 235 Ill. 589.

The clerk's record cannot supply this omission.

people v. Faulkner, 248 Ill. 156. Turning to the bill of exceptions in the record itself, we find it is only by inference that it can be held to show that appellant made a motion for a new trial.

whe judgment is affirmed.

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STATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Hon. DORRANCE DIBELL, Justice.

Present -- The Hon. DUANE J. CARNES, Presiding Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff. 186 I.A. 356

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5875

Charles M. Henderson, appelles

vs Appeal from Co. Ct. McHenry.

Frank Blakesley, appellant.

pibell, J. 196

Madarson Henderson ran a farm ditching machine, and dug a ditch across lands of one Howe, and to reach an outlet dug sixteen and a half rods across a small piece of land owned by Blakesley. He charged Blakesley \$1.50 a rod therefor, and sued Blakesley before a justice of McHenry County, and had a judgment for \$34.75, the amount claimed. Blakesley appealed to the county court, where Henderson had a verdict and a judgment for the same amount, from which latter judgment Blakesley appeals to this court.

Appellant claims that there was an irregularity in the ampanelment of the jury. This is not shown in the bill of exceptions. It does not appear that he made any objections to the course pursued. The record does not present that question for review.

Appellee testified that the work was done under an express contract between them that he should dig the ditch for appellant across a moltant's land and make a start and pay appellee therefor \$1.50 per rod, and proved that he did the work. He testified that he sent appellant a bill therefor, and that he afterwards met appellant, who pleaded hard times and saif he would have money later, but did not pay it. Appellee was corroborated to some extent. Appellant testified that he made no such contract with appellee, but that he gave appellee permission to cross his land with the ditch, if Howe the land owner who would be benefited by the ditch, would pay for it, and that appellee said he could charge the work to Howe. Appellee testified denying

PERSONAL PROPERTY.

v. Handsreen, monellas

Arphal from Co. St. MoHenry.

BY

ank bakeeley, appellant.

1861.A. 356

DIN J.

Homerum T. aderes dende of ore Here, and to read an sullet site and server leads of ore Here, and to read an sullet sixteen end a helf rode verses a null piace of leavened by Sinkesley. As clarged blakesley \$1.00 a rol vi erator, and aned Binkesley cafors a justice of Maheury County, of had a judgment for \$24.75, the arount claived. Ballouley, to the county court, there were had a ratio ratio also the same anount, from high restrict a judgment for the same anount, from high latter judgment for the same anount.

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Aspelles testified that the orbits of the nor down unity on a chart the orbits of the north as contrast between these dist he should in the distinct and contrast between the distinct and contrast between the distinct and contrast contrast and contrast and contrast and the contrast contrast and the distinct and contrast contrast and contrast contrast and contrast and

this. Appellant argues that the evidence was evenly balanced, and therefore appelles made no case, and that the court should have directed a verdict for appellant at the close of the proofs and should have granted a new trial. Appellant did not present any motion to direct a verdict and offered no instruction to that effect, and no such question is presented by the record. The court at the request of appellant fully instructed the jury to reconcile the testimony of the witnesses if they could, and if they could not, then to determine from all the evidence which witnesses were entitled to the greater credit, and that, unless the appelles had established his case by a preponderance of the evidence, or if the evidence was evenly aixi balanced, they should find for appellant. It is not the law that if the n mber of witnesses on each side of an issue is equal, the evidence is therefore evenly balanced and that he who has the affirmative of the issue must fail. The jurors may have seen that in the demeanor of appellee and of appellant, when testifying, which caused them to believe appellee and not appellant. The trial judge did not deem it his duty to grant a new trial. The record does not warrant us in disturbing his conclusion. Maggart v Peoria Ry. Co. 179 III. App. 39. If And varilet does not seen to us anifertly againer too sight of the evidence, we are not authorized to disturb itmeraly because we are in doubt whether the weight of the evidence sustains it. I. C. R. R. Co. v Gillis, 68 Ill. 317; Lourance v Goodwin 170 Ill. 390; Chicago City Ry. Co. v McClain 311 Ill. 589; Donelson v East St. Louis Ry. Co. 235 Ill. 625. We cannot say the court should have granted a new trial.

the small tyles of the state of the second transfer of the second tr Livert groom wife there as game on along and the court they in will Bu chale will an diamient, was dolbrer a felostic even record and obewald it was a maked a more areal. I will be a li on Acted to the petition of opening on motives gas theseasy noticoulon so that affect, and has one gradian a countries the succession with the discrept sale and the second of the second of with 1 to the grantered and animoder of grant and the ⇒u . at medi itom Misson yair it i a , diseo y di li s buitite see comment done wonders of all out n a salaem a sala encion per Doller , dise o medicer e .eomilive sa lo segrathmoreta a af este mid ladit Lincip yeds placed in this year of the year of the contract which is thd low localinate. It is not the law out in the mrall , il une dit agget in in abbit fore on breverit e out. Mis 1 Hours of Dill har been that what a swelchold at some. ulfirmetine of the insus much fuel. The furors out have natur , the ideas of the state of any side of as the day ifying, the old caused white we half the or palled and have this could be the set of the could be a coul er vistade na se engrana due se proces enf .init V Packin No. Co. 175 % . Co. Co. Co. i la como a la como estado de la como estado de estado d pintarui autrain of beatsoft no you all a jackebive add to usay ive the the defense of the state of the same and the same 1,0,0 THE REST OF SHOWING MANAGEMENT AND ADDRESS OF THE PERSON NAMED IN COLUMN TWO IN COLUMN TO ADDRESS OF THE PERSON NAMED IN COLUMN TWO IN COLUMN Li. 1883 Ponsison a Test Day Dead Fr. R. M. Common any the court elected in a common of the common of

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The court refused four instructions requested by appellant The first seems not to have been based upon any proof, and was against appellant's interest, and he was not harmed by its refusal. The second and fourth are embodied in given instructions. The third said that if the minds of the parties fid not come together upon all the terms and committees of the alleged contract, appelles could not recover. This was too broad, as applied to this case. The pleadings were oral. Appellant testified that appelles said nothing about the price. If the parties agreed that appellee should dig the ditch for appellant, but the price was not named, and appellee dug the ditch and sent appellant a bill , charging him therefor \$1.50 per rod, and appellant retained the bill without objection after the expiration of a reasonable time within which to object to the price charged, this tended to establish an admi sion and somescence in the correctness of the price charged, even if it had not the force of a stated account in a dealing between a customer and a merchant. McCord v Manson, 17 Ill. App. 118; Teigle t Erauti an 74 Ill. App. 285; 52 L. R. A. 602, note; 26 L. R. A. (N. S.) 334 to 351, note. The instruction was properly refused.

The judgment is affirmed.

The court reduced for a remarking and popular between the content of Line the term of the more bear forced when the term increased in the contract of the contract ya bersal for any al ber girantis n'imallera femilie es it is a facell, it is second or foreth or con tied in item instructions. The third said that it is minis of the pine erollinos for emus ent file magu medianot emos con bid . or one and like adding a printing bandle top he the bigiliarly of dealed in The Bids. The plant of the And printed lies suffered fair believes feeliges along es price. If the unties sared that appells should dig le diton for any fout to but to not and and -plants, If his tradition of the first position of the by him therefor fl.50 per not, our a seliant rechined the ald notice as a to no resigne oil withe notice do smooth II. les it than this to engage to engage simple, this it is a lo entiblich en admi sien und seguarence in the cours :.. The contract the price chartes, even if it had not the force if -to a la - memora o a neuvind gailes a al invecce hebers a chunt, Modrad v Manaon, 17 111, Arp. 115; Teargle v Franki un 74 111. Arg. 225; 31 N. T. A. 400, mote; 78 M. L. A. (T. B.) The Americation was required as allocal. ston , Lat of 44 the fuder of to effective.

STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff 86 I 4. 358

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5878

M. H. Fitzsimmons, appellee

VS

Appeal from McHenry.

William Cowan, et al (Tred Sievel, appellant)

186 I.A. 358

Dibell, J.

On July 32, 1904, William Cowan and Maggie Cowan his wife, executed a promissory note for \$2,500 and a trust deed to J. D. Donovan, securing said note, upon a lot in an addition to the city of Woodstock in McHenry County, which note became the property of M. H. Fitzsimmons and which was not paid, except certain interest and certain rents amplisa on the interest. On August 20, 1906, Cowan alone executed two promissory notes for \$1,000 each to the McHenry County State Bank, one of which notes represented what he then owed the Bank and the other was to secure future advances the Bank might make him. He secured these notes by a second trust deed, upon the same real estate, which second trust deed was not executed by his wife, but was duly recorded on October 2, 1906. On November 18, 1907, Fred Siebel obtained a judgment against William and Maggie Cowan in a court of record in said county and had an execution within one year. On Decomber 6, 1910 Fitzsimmons filed a bill to foreclose the first trust deed and made the Cowans and the Bank and Siebel and others defendants. The Bank was not served and Donovan was not made a party to the bill. There was a reference to the master and proofs and findings reported by him and a decree pursuant thereto. It found the amount due Fitzsi cons and directed a sale of the premises and the payment of said sum to complainant from the proceeds of the sale. The decree further directed that the master, out of the interest of

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Tallata Cowen, et al

(Pred Siebel, appellent)

186 I.A. 358

Libell, J.

On July 22, 1804, William Cowan and Yesgas Coun is wife, emerched a prominent note for "A, 100 and a to it It I to J. D. Donovan, papuring raid note, uron a Lot . u n distribute the outy of Woodstock in MoHenry Scunty, asch mote hadden the property of M. H. Fitzei . one of thick .mm not paid, except derigh inverset and certain rinte applied the interest. On Aurunt 90, 1906, Count alone smeened issory moves for 1,000 sach to the Molency County Device of the description of the contract of the contract of the over I s Dank the empt of some of the chitchen the same and the unic might this him. He secured toses moter by a research gim a Last Janua Races Weith, others Lees same and and and -tet to initesen girt out the mide, but the followers ton the war 2, 1908, On Yer hayen 18, 1909, Frai Finbel old instant Proces to the me a communication like model EM decided angle n said country of bad on emecacion willing one was Dg C or of the second of the second and the second of the secon is the the the contract and after how look found to al others defendance. The Tunk was not a week and targers the notice of the section of the section of the section of in a leaves a number to elected the restand and George pursuant terrates. It found the energy and Market err les is a sport of the cartment of to also a refourth fine in John Mile. In this present air takt betoetti teritori. William Cowan in the remainder of said proceeds, pay the Bank the sum found due it, "if he can determine such interest," and bring the balance into court. The master made his report of sale and of payment to Fitzsimmons in full and that he had in his hands \$1,107.96 the balance of the proceeds of said sale, awaiting the further order of the court as to its distribution, as he was unable to determine the interest of said William Cowan in said real estate. On May 28, 1913 the court entered an order that said last named sum be paid by the master to the Bank "and thatit be accepted by said I nk subject to the incheate right of dower thich "he was an appeal by Fred Siebel from that order.

It is contended that the original decree was erroneous bsoluse Donovan, the trustee, sho held the title to the linds was not a party. To this there are several sufficient answers (1) This is not an appeal from the original decree. It is not a writ of error which would search the whole record. As no appeal was prosecuted from the original decree, it cannot he assailed on this aspeal. (3) Although Ponovan was not as ad as adefendant, he obtained leave to file an answer and filed an answer which began "The answer of J. D. Donovan, trustes and as President of the McHenry County State Bank." Complainant filed a replication to this answer. There is in this record no summons having a return showing service on the bank, but the certificate of the clerk to the record is not that this is a complete record, and there may have been such an answer on file, or the answer of Donovan may have been treated as the answer of the Bank. There are no irregularities of which Siebel can avail to defeat the original / decree.

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It is contended that the criginal decree was auronour couse Ponoren, the tractes, she hald institute to the tamin ers and for bother larger out when ship of .yfrag a for saw of dI .seroek Andr the bad moon farmen and de of et. 11 ic the same of earth thick rough around the rise of earth and To appeal her proceedured thus his ordifical terror, it commet Lette dan and anyone Translit (2) Alternation of thiseas were te a standard, he oblighed Lords to file on enterelate as s i . n. . don beren "The commer of J. I. Indocen, to . i a man I have placed where medical part to the larger at their ut at and Filed a replication of the representation of this record no number of the contract of the service on the bank, but the earth facts of 1 wisch to 10 process: and their fair see the more than it is in it. such an anorem on Mile, or the return of Terroria and the - - Dir of of Loug. To , And he has remembered and he hetieut note. to home a total of the standard and federa do the later to APPROXICE.

There is no averment or proof in this record as to what interests William Cowan and Maggie Cowan had in this lot. The premises may have been owned by William Cowan and the first trust deed may have been signed by Maffie Cowan merely to release her dower and homestead. It may have been owned by Maggie Cowan and signed by William Cowan merely to release his dower and homestead. They may have been sach the owner of the undivided one-half. The bill alleges that when it was filed, they were not in possession, but tenants were. That might be true and yet they might not thereby have lost a homestead right. If the premises were homestead when the second trust deed was executed, then it did not give a lien on the homestead, being \$1,000 of the value of the property, because it was not executed by the wife. Despain v Wagner 163 Ill. 598. Siebel in his answer stated that Cowan and his wife owned the premises. Taking this as true, as against Siebel, the appellant, the homestead right, if any, was cuty off by th first mortgage, and the entire interest of the Cowans was properly ordered sold to pay the first trust deed. But before the residue could be applied, it was assential that the court further find and determine the rights of the parties. If the premises were not a homestead when the second trust deed was given and William Cowan owned the property in fee, then it would be right to pay the Bank. If the premises were not homestead and Maggie Cowan owned the fee, then the residue should have been applied on Siebel's execution. If Cowan and his wife each owned an undivided one-half of the premises, another result would be reached. Further proofs must be heard and the interests of the parties in the land, and therefore in the residue of the proceeds of the sale of the land, must

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be fixed by a supplemental decree lefors where can wanted the payment of the recidue of the money to any one.

The order of May 28, 1913 is therefore reversed and the cause is remanded to the court below for further proceedings in conformity with this opinion.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk

J. G. MISCHKE, Sheriff.

186 I.A. 368

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5884.

Skilbeck and Brown, appelless

VS

Appeal from Lake.

Hans Andreasen, appellant.

Dio.11, J.

Appelless sued appellant before a justice to recover a bill which they claimed appellant owed them for lathing done by them for him upon a building containing eighteen flats. Appellant did not appear before the justice and appelless had judgment there for \$63.85, the full amount of their claim. Upon a trial in the circuit court on appeal they had a verdict and a judgment for \$50, from which defendant below appeals.

There were disputes in the testimony as to the terms upon which appelless did the work and as to the kind of work they did and as to the amount they did and as to whether or not the openings should be deducted in securing. The appearance of lathing, and upon certain items of set off claimed he appearance. The jury have settled these controverses question approved by the trial judge.

Appellant contends that the court erred in rulings upon testimony. Appellant testified that he paid 7 to one Stewart to secure other men to do that part of the work not done be appellees. That was excluded. There was no testimony that it was necessary for him to hire Stewart to get other lathers to complete the work nor how much time Stewart spent in finding the lathers nor that 7 was a reasonable compensation for the service rendered by Stewart, and in the absence of any such testimony the ruling of the court was where appellee had not nailed the lathes, except in the

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.. bounds J.

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a sawa in the dispersion of a larger Maw oresil Associated the state of the sta to court to the fear till got doment off as to have his year. from that the ent mi besombet it bloods and many call it - A thing, and a on the did it is the action and masur ; hore realiss areas suites a cred yest set . water I have the solder dath of more or an are or bor doubt to eved by the trank guings.

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center, and that he hired a man to go over the work and complete the nailing, and paid him \$10 therefor. Appellant was then asked by his counsel if he knew what it was reasonably worth to have that nailing done. He answered "I don't know but that was as reasonable as it could be done. " Appellant zum assumes that ampellee's counsel moved to strike out the last part of that answer and that that motion was sustained by the court, leaving the answer to stand simply "I don't know", and he argues that that was error. The abstract so reads, but the record before us reads that appellee's motion was to strike out the first part of the answer and that that motion was granted. That left the answer to stand: "That was as reasonable as it could be done," and with that answer in the record, appellant was not harmed by an objection sustained by the court to the next question on the same subject. Moreover, said last objection was not sustained till after the question was answered and appellant did not ask to have the answer excluded. Moreover, there was other testimony that that charge was reasonable and it is quite possible that it was allowed in reducing appellees' claim from \$63.85 to \$50.

The trial judge asked certain questions of appellant's witnesses and it is argued that those questions were calculated to prejudice the jury against appellant's case. Appellant did not object to any of those questions. It is held in People v Abrams 340 I.l. 819 and in the cases in the supremendant, that if the field judge repounds any improper question to a silent according to may be injured thereby must by objection and expection preserve the same in the record if he desires to insist upon that as a ground for reversal. Section 81 of the Practices Act, as amended in 1911 does away with the necessity for

ter, and that he hired a contract of your said that some plate the milling, and raid bir "20 therefor, A juli bit then takes by his councel if he limer whit i we have to be the and the Is homeway of .com miller take eval of Atter int the fig. "..." If there is no electroseen as eas seed dur the willian or tever for you wheelsey's that commuse we -ton ... Littim Suda to 1 has menean dada to drag teal add by the court, isoving the conver 's erin, carply " n't know", and he exemen that that was sair, "... a f firf chart by stoled took tall the take to read the . I he free that and the edition of sew motion o'coller ameras sud tiet that motion wer granted. This left the * ad Adape ther eldenoseem on ear tanty thresh of newara iono, " and rith that anywar is the recom, a routing of lamer will ad bantatans mottoride an ye beward ton our 1. 1 i i juve no" . touldwe unne e't me metteaur : var gula by rail washa flist bankaraye son saw noi and and and angeliant did not now to have the interest in typenifeed merice was easily to the tentile to samps was reaccomide on it is gotto project as the contract of . Ob' of 31.23 ork minio inselleges primaker at bewo.

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preserving an exception, but it is still the law that counsel considering themselves injured by such questions must poject thereto and give the trial judge an opportunity to withdraw the objectionable question. These questions were not saved for review. The clerk will tax the additional abstract to the appellant.

The judgment is affirmed.

Whitney P. J. took no part.

rving an exception, but it is still to lar that counsel dering theresives things in the conject dering theoretics that object or the last city to retail the trial frage on organism to retail the retail of the country to retail the rate of the country to retail the retail of the country to t

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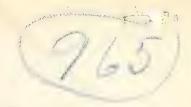
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STATE OF ILLINOIS, second district. Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

186 I.A. 375

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 5898

Sam Clauston, appellee

VS

Appeal from City Ct. Kewanes.

Galesburg & Kewanee Electric

Railway Co. appellant.

186 I.A. 375

Dibell, J.

Third street in the city of Kewanes runs east and west. Appellant operates a street car line in said street. Appellee owned a sprinkling wagon with which he sprinkled streets in the city. Lockert was in his employ driving and operating a sprinkling wagon drawn by two horses. A little before noon of August 15, 1911, Lockery drove said team and wagon south from an alley on to Third Street and drove west on Third Street about 65 feet and then turned south across the street railway track and then drove a short distance east, sprinkling Third Street. When he crossed the s street car track he noticed a street car a block and a half west, but he testified that he thought it was going the other way. The distance between the south rail of the street car track and certain telephone and other posts south of the travelled track in said street was not very great. street car was in fact going sast. There is a great diff rence in the testimony as to the speed at which it was running. The motorman, still in the employ of the company, testified that he was running 18 or 30 miles per hour. The street car struck some part of this water wagon and broke it and injured the horses. The owner sued the street car company for the injury to his property. At the first trial had a verdict for \$75 and he confessed a motion by the company for a new trial. At the second trial the jury liver reed. At the third trial he had a verdict and a judg-

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1861.A. 375

Dineil, J.

Think from the mild to give the street brands . it a. It are a Al woo fleeth a merchasmo inclinational. Lower to the file apply which her a bear o salie, A in the city. Buchang wir into English civil, inc equiphing a untimbular order of number of hittel a large and the tile before noon of August 15, 1011. bealery drove this term las! a weekl being on a lie as me well have money bus on Mire Street about 00 feet had him to well to 11. Fr. 1 - 1 sveri not. Fir doerf gariimr deerfa edf to Para bulled nell . Section Daily pair thing , tone son Lill Indifference describe Association of Maris Man Committee or a just of the defigurant and doubt hostitutes and doubt deeps The way, The distinct but all meeting somether off . was new in a fract of the contract to the second to the contract to th and all the standards and and the standards and men n. At dair i hear i ar in grantfeet oil at som ing, Teamorous as a file and a section of the section and ed later to see the first of the fact being being in the profit of the second state of the second sec - injured the horann. The man near the best beat min-I has been all it . . . e this of youthe was not y inglication and a mean. The of the factor of had Total for a month to a second of the a most specific - Zj. . Jos ton linkel fieled balas oft the balance

ment for \$300 from which the company appeals.

The verdict is moderate for the injuries inflicted upon appellee's property. The jury could hardly find otherwise from the evidence than that the motorman, in charge of the car, was negligent in its operation and was running it at a high and dangerous rate of speed and that by the exercise of due care he should have had it under such control as he approached this water wagon in front of him as not to have hit it. The only debateable question of fact is whether Lockery, the driver of the wagon, was in the exercise of due care. Upon that question the swidence was conflicting and a warket verdict either way might be sustained. had a right to drive upon the street and if, as appellants evidence tends to show, he drew in towards the track, even that he had a right to do. Appellant's proof is that the motorman was sounding his gong. There is other evidence tending to show that it was not sounded. If Lockery thought the car was going the other way, he may have been entirely anthorized to draw his team in nearer the track in order to sprinkle the center of the street where the track was. The jury might reasonably conclude that if the water wagon was slightly outside the line travelled by the street car yet ordinary care would cause a motorman to know that the Wagon might come still closer and that he ought, in the exercise of due care, to reduce his speed, and that the driver of the wagon might reasonably expect that if any car came up behind him when he was so close to the track, it would be under control. The jury have found that Lockery was exercising due care and the trial judge has approved that conclusion. We cannot say that the decision of that question of fact should have been the other way.

Appellant argues that the court erred in permitting

esione to the engine of the first more continued to The vertical is a standard of that I profer all this were ent title are the markets of the section alton the relicence of an flat was a second men as a second i. I' it. in hor wath warm old at familine may wan coliner at all land has a fire approximate for high a and the state of t annoughed thin to ber them in the interior. It is the inand the it, The only demokable quantity that it is a children Decrease of the second of the model of gill result the poorways of worthory but as W , the contraction was daily by the contract of the contract was a contract of the contract of th teal att a to the had beento if no a evint or injury subsect touris to show, its does do consults. I that for the the bear of the to to Angellage a tente of the bar of the . It is a nitrate to the painway ask migration In . . first " . Why a fer is fitted wade at the in the contract of the contrac The first that the transfer makes with some of the beside is . The section of the section of all all and the section of the sec ្រុក ប្រជាពលរបស់ នៅ នៅក្នុង ស្រាស់ ស្រាស t i lilli lilli lilli i lilli i lilli i lilli bio gilligili odo the contract of the contract o of the paint of the volume about the error filling mode. entered at draw occas, we created in the table of to the first section of the second of the se the second of th n lota de la company i enjadi "Lotanot zebuo ta or in the base and analysis of the contract of of the first control of the special control of the first area of the special control of the The transfer of the factor of the contract of

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Lockery to describe his injuries. It was competent as tending to show the speed with which the car was driven when it struck the wagon. But, if this is not so, other witnesses testified to the injuries to Lockery without objection. He was rendered unconscious. Some of appellant's witnesses testified to the same fact. The fact was abundantly proved by testimony to which no objection was made.

Numerous instructions were given for each party and appellant contends that those given for appellee are nearly all erromeous. Some of those given for appellee are not perfect in form, but we conclude that they did not mislead the jury and that the jury were properly and sufficiently instructed as a whole. The propositions of law bearing on the case were very few and were correctly stated.

The judgment is affirmed.

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STATE OF ILLINOIS, second District. Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

186 A 474

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March in the year of our Lord, one thousand nine hundred and fourteen.

ing the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.
Present:
Hon. Harry Higbee Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.
A. C. MILLSPAUGH, Clerk. W. S. PAYNE, Sheriff.
And afterwards in Vacation, after said March term, to-wit: On the day
of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, a
OPINION in the words and figures following:
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ERROR TO
APPEAL FROM
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186 I.A. 474
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VS.

October Term, 1913.

Par COUNTY

TRIALJUDGE

Hon M M Brister



October Term. A. D. 1913.

N. J. Cletcher,

Appellant,

VS.

Estate of James 1.
Alsup, Deceased,
Appellee.

Appeal from the Circuit Court of Pope County.

186 I.A. 474

LcBride, P.J.

This was a suit by appellant to collect a note from the estate of James L. Alsup, Appellee. A jury was waived and a trial had before the Judge, who, after bearing the estatement, found in favor of the estate and rendered judgment the prosecutes this appellant for costs, from which judgment the prosecutes this appeal.

The only question made and argued in this court is, that the finding of the Circuit Court was against the weight of the evidence. It was asount by the appealant to recover upon the following note:

Ten Hundred Dollars.

Aug. 15, 1911.

One day after date 1 promise to pay to K. J. Cletcher or order, ten hundred dollars, for value received of ner with 7 per cent interest from date.

James L. Alsup.

The note was written upon plain thin paper and bears evidence of eracures in several places, and it is admitted by appellant that eracures were made, and the note was changed from a note of fifty-one dollars to a note of ten hundred dollars but she claims that the change was made before the note was signed by the deceased James L. Alsup. Der incommetancy as a witness was valved in part and she was permitted to totally so far as her evidence will tend to explain such alternations and

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Agenda No. 21.

October Ferm, A. D. 1913.

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Care History

VS.

Labele of Jones ... Aleum, Decement,

Activity Press, 234 Circuit Court of Pape Country.

1861.A. 474

.t. .. . ITHON

air mort sion . Instinct by much and plant a man will estate of Jones 1. Aleup, Appellae. A jury was wrived or to trial and before the Judge, who, after hearing the evidence, found in favor of the estate and rendered judgment against the magellant for soute, from which judgment sid properties that appeni.

The only question made and argued in this court is, that the finding of the Cippult Court one against the veight of the evidence, is see count by the appellant to gooder out of fellowing notes

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One day after date 1 province to may to 1 . J . Clatcher or order, ten hundred dellers, for value received of mer with 7 per cent interest from date.

James L. Alaun.

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interlineations." She claims that the deceased came to her and wanted to borrow one thousand dollars and that she told him she could get it from her brother W. M. Barton. She claims that she did get the one thous ad dellars from larton, is money, and proved by Barton that he let her have one thousand dellare in money: and she further claims that at the time she let the deceased Alsup have the one thousand dollars he agreed to buy her fifty dollars commission and one dollar car fare, and that she wrote out a note for the deceased to sign for the fift -one dellars and that after the note was written out, or nearly as that the deceased said to her that he would just give ber that andlars in cash and not make that note; that she agreed to this and that she then changed the note from fifty-one dollars to ten hundred dollars, the amount that she claims to have lammed his, and that he then signed it. It appears from the evicence that as she first wrote out the note for fift -one dollars it and made payable to her husband I. C. Cletcher; she then changed the .. C. to M. J. the fifty-one dollars to ten hundred dollars and ollar, ed the word "his" to "her", and it also appears from the evidence that she changed the date of the note. The says the down not know whether she changed the date or not but the evidence of other witnesses shows that the date was changed. It is conceded that the signature to the note is the commine signature of the deceased James L. Alsup, and some of the witherser tertify that there are at least three different handwritings appearing upon the face of this note. It is true that the claimant proved by the witness Upton that the deceased conted to berrow some somey from him and that he could not loan it to him and Alsup than said he was going to see if he could get it from Ur. or Ur. Victor, and that the deceased afterwards told the situes that re. Wetcher had promised it to him. There is some further evidence that

interminentions. " the claims that the deceased orme to ber and wanted to borrow one thousand dollare and that she told him she could get it from her brother W. W. Barton. She claims that she did get the one thousand dollars from Earten, in money and proved by Parton that he let her have one thousand dollars in money; and she further claims that at the tive she let the deceased Alsay bave the one thousand dollars he save to may her the dollars commission and one dollar car fare, and that she wrote out a note for the deceased to sign for the fifty-one dollars and that after the note was written out, or nearly as that the decembed to her that he would not give ber thirty dallare in and and muke that note; that she egreed to this and not of wraffob san-villi work aft begasde ned ens tent mid beneal eyed of unitie and indi income and trailed berbund and that he then signed it. It appears from the evidence thet as she first wrote out the note for fift -one dollars it was as to M. J. the fifty-one delines in the hundred dollars and somplet the word "him" to "her", and it also appears from the evidence that she changed the date of the note. The says she does not know whether she changed the date or not but the evidence of oththe date shows that the date was changed. It is concerned that the signature to the note is the resulae signature of the deceased James L. Alsup, and some of the witnesses tertify that many private these williams distributed from the east of the the face of this mote. It is true that the claiment proved by the witness Upton that the deceased wanted to borrow some money diss ment quelt has mid of the meal ten blues and that bas min work he was gaing to see if he could not it from Mr. or Mrs. Cletcher, and that the decement afterwards told the witness that Fra. Cletchor had presised it to him. There is some further evidence that

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tends in some degree to corroborate the testi ony of the old ant but none of it is conclusive or could be made so without the aid of her testimony, and her incompetency was only waived as to such matters as tend to explain the errourse and interlineations in the note. The testimony of appellee, in addition to that already mentioned, tended to show that some time prior to this the deceased had given a note to 3. C. Cletcher, her hus band, for the amount of fifty-one dollars; that deceased had paid off this note but the note hed been returned to his sod that Alsup went one day and inquired about the note and wanted it returned and the appellee looked for it but was not able to find it. And it is further claimed by the appellee that this fifty-one dollar note that had been paid off was the note out of which the ten hundred dollar note in question was made, and that this fifty-one dollar note which bare the genuine signature of the deceased Alsup was used as a basis upon which to form the ten hundred dollar note because it had his signature. It is admitted by the samellant that she changed the fift -one dallars in the corner of the note to ten hundred dollars, and that the amount was changed in the body of the note, and the evidence further shows that the words "or order" were in ertod in the note and the date changed and the letters "S. C." orased and "M.J." inserted. We are inclined to think that it is at least passing strange that she would go to the trouble of making all of these eracures and interlineations upon this paper, as she did, rather than write out a new note which could have been done with much There are also some other facts and circumstances tending to corroborate appellee's theory of this case but there is one circumstance testified to by the experts, that the date of the note was changed, which is not denied but she says in her testimony, she does not know whether she changed the date of the note or not. If the note was written upon August 15th, as she

tenderly were degree to cerrolecule the healthmay of the clote-Junifity on about of blues to svinulance at il lo enen ind ins boving wine and her testinger, and her incompact year to bis all as to such matters as tend to exulain the erasures and interlinestions in the note. . The testis my of annulles, in addition to that already mentioned, tended to show that some time prior to this the decembed had given a note to J. C. Cletcher, her her the tentional past promited our offic to fourme add tel plone lar will of beneater need hard stee but the bir ald the bir before the oten out toods borings has yet ego from qual's fast it returned and the appetion lawyed for it is not one of the to and it is further claimed by the spiniles, that this fur aton all new lie biss need bad tody aton relieb eno-ythir of which the ten bundred dollar note in question we were le that this fifty-one dollar note which bore the genuine wisherare of the decessed Alsus was used as a bacis woon witch to form the less condept dellar order because it had his rigoritary. edmitted by the appellant that she changed the fit -one dollars in the corner of the note to ten hundred dollars, and that the emount was changed in the body of the note, and the suidenes further shows that the words "or order" were in orded in the nate and the date changed and the letters "S. C." crared and "L.J." incerted. We are inclined to think that it is at least passing read to the mixing to the trouble of making that serrange eraques and interlinestions upon thin paper, se the did, rather down tite and a may even blues dottiv ston was a tuo structual dess tranble. There are also some other and ell-matteres tending to corroborate appellee's theory of this case but there is one circumstance testified to by the experts, that the date of the note was changed, which has not deplet his bear afor all testimony, sale does not know whather she changed the date of the note or not. If the note was written unon Juguet litth, se che

claimed, for fifty-one dollars and then changed from fifty-one dollars to ten hundred dollars, why was there any necessity for changing the date of the note? No explanation is made and it seems to us without some explanation that it is unrememble; but it would be perfectly reasonable that if the old note were used as a basis and it bore a different date, that it would have to be changed to correspond with the date of the transaction. It seems to us that when a note bearing so many unreasonable scasures, which could have been easily avoided, and changing a note from the small amount of fifty-one dollars to ten hundred dellars were made, and no explanation given as to any a new note was not prepared, that it requires very close scrutiny upon the part of the court before allowing a claim for all this character against an estate.

The appellant and appellee each upon their own theory of this case presented the evidence and the trial Judge who saw the witnesses upon the stand heard their testimony, viewed their demeaner, was much more able to determine who was telling the truth about this matter than we can from the record. This was purely a question of fact to be determined by the Judge and is the determination of a question of fact he stands in precisely the same stitude ass jury, in that respect, and his findings and conclusions are to be given the same weight as those of a jury upon a question of fact. Himmo vs. Luykendall, St Ill., 476; Conrad vs. Eloepfer, 33 App., 228.

We cannot say from this record that the finding of the trial Court was manifestly against the weight of the evidence, and unless we do so find we have no right to disturb the judgment and finding of the trial court. The are, however, of the opinion that the trial Court was fully warranted in its rinding in this state ter and that he committed no error in rendering judgment against the appellant, and the judgment of the lower Court is affirmed.

JUDGMENT APPLICATION.

(Not to be reported in full.)

changing the date of the note; we explanation is made and it seems to us without some explanation that it is unressouble; it would be perfectly reasonable that if the old not not as a basis and it here a different date, that it would baye to be changed to correspond with the date of the transaction.

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Ve cannot say from this record that the finding of the trial Court was manifestly against the weight of the evidence, and unless we do so find we have no right to disturb the judgment and that car the trial court was fully warranted in its finding in this ratter and that he committed no error in readering judgment against ter and that he committed no error in readering judgment against ter and that he committed no error in readering judgment against term that he committed no error in readering judgment against

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the tate of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said ppellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this
A. D. 1914.
Clerk of the Appellate Court.

OPINION

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AT AN APPELLATE COURT, Begun and held a month of March in the year of our Lord, one thouse to 24th day of March, in the year of our Lord, one th	t Mt. Vernon, Illinois, on the Fouril Tuesday and nine hundred and fourteen, the same be- nousand nine hundred and fourteen.
Present: Hon. Harry Higbee. Presiding Justice. Hon. James C. McBride, Justice. Hon. Thos. M. Harris, Justice. A. C. MILLSPAUGH, Clerk. And afterwards in Vacation, after said March te May, A. D. 1914, there was filed in the office of the C	W. S. PAYNE, Sheriff.
	ERROR TO / APPEAL FROM
Clay	186 I.A. 506 Otty court
No	Colfour COUNTY
Jerres	
TRIAL	JUDGE

Hon. Wanderster



October Term, 1913.

Roger J. Clay,

Appellee,

VS.

Aluminum Ore Company,

Appellant.

Appeal from the City Court of East St. Louis.

186 T.A. 506

McBride, F.J.

The appellee recovered a judgment of three thousand dollars in the City Court of East 2 t. Louis, Illinois, to reverse which judgment this appeal is prosecuted.

It appears from the record in this case that on and prior to the 8th day of October, 1910, the appellant was engaged in building a structure in its plant erected for the preparation of aluminum ore, which building was being constructed of iron and brick. The roof rested on the brick walls and there were iron braces from one brick wall to the other to support the roof and on the top of the brick work were placed triangular pieces of iron which joined together in the center of the build ing and when riveted together constituted a summert or rafters for the roof. while riveting, boards were placed from one trus to another upon which the riveting gang would stand while performing their work. Appellee began work for the appellant four or five weeks prior to the time of his injury and had, for the most part of the time, been engaged as carpenter, mill-wright, helper and operating an elevator. He had not been engaged with the riveting gang for more than four or five days. He first began his work with the riveting gang under a man by the name of Dan kyan who, as appelled claimed, was acting in the capacity of foreman of the gang. hortly after appellee began this work Ryan was removed and a man by the name of Cavanaugh was

October Term, 1915.

Roger J. Clay,

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Assendances Ore Company.

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Ampeal from the City Court of aut St. Louis.

186 I.A. 506

McBride, P.J.

The appeller recovered a judgment of three thousand dollers in the City Court of Rast S t. Louis, Illinois, to reverse

It appears from the record in this case that on and prior to the 8th day of October, 1916, the appealant was engaged in contractions and and temporal facing all at expression o guidalist of aluminum ore, which building was being constructed of iron and brick. The roof rested on the brick walls and there were tronger of realto sat of law word one mark second north throughout decode your liver spiror and to ned add me how loom dilar all I terms all at sellend bintel, make next to consis ing and when riveted tagether constituted a summer! on reflere for the row and been a were alseed and true true to another upon which the riveting pany would stend while werforming their work. Appellee begun work for the aspellant four or five weeks prior to the time of his injury and had, for the .id_liw-lila .resnerse on beganne need .amit sait to frag from heiper and operating an elevator. He had not been engaged with the riveting gang for more time four or five days. He first began his work with the riveting gang under a wan by the name of Dan Myan wire, as appelled claimed, was acting in the capacithe print register this pitter throw the printer being being work liven was pomoved and a mon by the case of covered was

but in his place who had supervision of the riveting gam. which consisted, at the time of the accident and for some days prior thereto, of Cavanaugh, Reeder, Stieger and appellee. Stieger and appellee while performing their work would stand upon boards laid from one truss to another and above them and on the coposite side of the iron being riveted war Cavanaugh, and Reeder was below them. Reeder would heat the rivets and pitch them us to Stieger who caught them in a backet, tieser would place the rivets in the hole, appelled would then place a buck-bar which he held, and was used to hold the rived in place, against the rivet while the other end of the rivet , as flattened out by Cavanaugh with an air gun. There were weveral gangs of men engaged in performing the same character of 32 work who were under the general cupervision of Joe Weist as construction foreman of ampullant. Feist in his examination says that he did not have a special foreman under him but that he would have one of the leading iron workers of the gang, some old man that he knew was all right, to break in the new ones and tell them what to do, and when they don't obey the leader he would come to me and I would adjust the difficulty. Cavanaugh was the leader of this game and I told appellee to get his instructions from Cavanaugh as to bucking un riveta, etc. pellant furnished the lumber for the riveting gang to use in constructing platforms upon which to stand but the lumber appears to have been scattered about over or near the building and when the men desired lumber of the four engaged in the riveting would go out and get the necessary lumber, and soretizes all of them would go. W hen a piece was selected, by any of the men, Cavanaugh did not like or thick proper to be used in the building of the platforms he would reject it. ben this riveting gang of which Cavanaugh is claimed to have had theree and control of came to drive the rivets at the place where the

put is his place who had supervision of the riveting page. well some at the inchisco of the national to see a formation and in prior thereto, of Cavanaugh, Reeder, Stieger and appellee. Stieger and appellee while performing their work would stand upon boards laid from one truss to another and above them and on the conceite side of the iron being riveted was Cayanguin. and Reeder was below those Reeder would heat the story and pitch tues up to ottages was sought toes to a medict, classer would place the rivets in the hole, appelled would then where a buck-bar which he held, and was used to hold the rived in place, sgainst the rivet while the other end of the rivet was flattened out by Cavanaugh with an air gun. There were coveral gangs of men engaged in nerforming the seas character of 68 to July hell be eminivened between any rebox once one fine neijaniwase aid at telet . Inellegge to nemerok neitaustenes trus Jud mid rebnu meerel laicens e svan jen bib ed jadj ayes ne would have one of the leading iron workers of the gang, some old men that he knew was all right, to break in the new ones and tell them what to do, and when they den't obey the levder augh wan the leader of this gang and I told appellee to get sis instructions from Cavanaugh as to bucking up rivets, etc. 45ni sau of gure guitovir out tot reduct out bedeing gang to use in -qa radmul and bud basta of abidw mogu sarelista galiburianos inthitud add rees to tave duada betation meed evan of smage and when the men decired lumber of the four engaged in the riveting would go out and get the necessary luster, and so cines all of them would go. W hen a piece was relected, by any of the men. Cavanaugh did not like or thick proper to be ared in the building of the platforms he would reject it. . iven this givating gang of which Cavenaugh is claimed to have had charge and control of case to drive the rivere at the place where the

injury happened they built a platform upon which stiefer stood but there was a platform or board extending from one trues to another at the appropriate place for appellee to stand and perform his work. The evidence tends to show that when it was discovered that this board was in a right position for conellee's use that Cavanaugh directed appelled and brieger to step cut on to the board and see if it was strong enough, which they did, and appearing to be strong enough he directed welles to use this board to stand upon thile flattening the rivers, which appellee did, and after working a few cinutes at driving the rivets appelled's buck bar slipped on the rivet and thereby extra pressure was thrown on the board and it broke and three arpellee to the ground a distance of twenty-six or twenty-seven feet and injured him. It was then learned that there was a knot on the lower side of the board at the whose where it broke. which extended across and a considerable distance into the board and weakened it which can caused the board to break. It is claimed by appellee that Cayanaugh was the foreign and that it was his duty to have inspected the board and the promer inspection he could have ascertained that the board was weak and unfit for a platform; while, on the other hand, it is contended by appellant that Cavanaugh was only a follow nervant and that no greater duties of inspection devolved upon him than upon agpellee and that as appellee had gone out on the board before using it and tested it, and had used this beard without being authorized so to do the t be assumed the risk and that no limbility for the accident attached to the appellant.

The first count of plaintiff's declaration, omitting the formal parts, alleges, "That the defendant negligently and carelessly furnished for the plaintiff to stand on while performing his duties, certain planks which were weak, defective and uncertain for the purposefor which they were used and which weak and

injury happened they built a platform upon which Stiever stood but there was a platform or board extending from one trues to smother at the appropriate place for appulse to stind and perform his work. The evidence tends to show that when it was -learn wat maiting sight a at new broad shift fait bereveralb neis of reason the care and directed appelled and Diener of out on to the board and see if it was atrong enough, which they of and appearang to be strong charge in directed sunsland the blis benefit to wheld once the finitely of being the clother bears. entransiste did, one write voiling or few namedes at deleving the rivets appellee's buck ber sli: ned on the rivet and thereby eran uprat Bus shord it bus brand out no awords aw erussers aid only of the ground a distance of twenty-size or twenty-serve fort and injured tip. It was then becomed that there was a knot on the lower side of the board at the place where it broke. which will and account to a constant of the contact barrier will be been sent to be the best to and vertices it which was council by bear to branch the claimed by appelles that Cavanauch was reserved and the was his duty to have inenected the beard and that/a present inspection he could have accertained that the board weak and untit for a pletform; while, on the other hand, it is contended by applicant the target school a felice screent and that no reenter duties of increation devolved upon this thur then erpellog and that as appelloe had gone out on the beard beiore uping it 'and tested it, and had used this loand without being authorized so to do that he appused the rick and thut no limitly for the scoident attacked to the appealant.

The first count of plaintif's decimantion, emitting the formal parts, caleges, "That the defeatant neglipently and water leasty-furnished for the plaintiff to stand on while partowning has do the country and the partowning the document.

defective condition of such planks was known to the defendant or could have been known by the exercise of ordinary care but was unknown to the plaintiff and could not have been discovered by him in the exercise of ordinary care."

It further evers that while standing upon one of the alamka so furnished in the performance of his duties, and while in the exercise of ordinary care for his own safety the plank broke and personently injured appellee. The second alleges that plaintiff while engaged in assisting and riveting and factoning together certain pieces of metal used in the formation of such building that the work in which he was then engaged required him to stand upon a certain scaffold furnished by the detendant and avers that under the statute then in force, which provided for the protection and safety of persons engaged in and about the construction, renairing, altering or removal of buildings, bridges, viaducts and other structures that it was the duty of defendant to erect and construct said scaffold so as to give proper and adequate protection of life and limb of any person e .played or engaged thereon. That the defendant did not so erect and construct the scaffold upon which ambellee was required to perform his duties but that it was weak, defective and insufficient, and while in the exercise of due cure for his own safaty the plank upon which he stood broke in two and he was hurled to the ground and injured. This count does not charge wilful negligence upon the part of the appellant.

At common law it became the duty of appellant to furnish appellee with a reasonably safe place in which to perfor his work. The question now under consideration is, did it do this. The appellant contends that the place unon which appellee was engaged at work was not furnished by it; that it furnished appellee and his associates with suitable and praner material with which to erect a platform upon which to perform the work and that

defective condition of such planks were known to the defendant or could have been known by the exercise of ordinary care this we have been known by the exercise of ordinary care."

It further evers that while standing upon one of the planks so furnished in the performance of his duties, and while in the energy

and permanently injured appellee. The second alleger that micaj at her parievir has gaineines at hegages often Mintele togother certain pieces of metal used in the remation of audi building that the work in which he was then eagaged resulted him to stand upon a certain scaffold furnished by the defendant and avers that under the statute then in force, which provided for the protection and enfety of persons engaged in and about the construction, recairing, alterias or recover of building bridge es, viaducts and other structures that it was the duty of de--core sein of se on blettuse bins fortiques has joers of imabael -re meaner was to dwil how stil to meltostera stempohe has to shared on any supplied the season of the sea et beriuser san estlame deide some bleffese set isurianes bas organs and estimated the same and the same saturation and saturation cient, and while in the emercise at due cere for his own surety the plank upon unich he stood broke in two and he was invited to -now full by sand son seek smoon slift .herwist has become out ligence upon the part of the anadlant.

it was their duty to construct a platform out of the goterial so furnished; that the/ failed to do this but chose to use ober material that was not saie, which had been pre-ared and used by some one else for some other nurnose and by so doing avoided the labor of constructing a platform. Appellue contends that he had nothing to do with determining how or when a glatform should be built; that the determination to erect a platform, its manner of construction, etc., were all left to the discretion of the foremen Cavanau, h; that the platform used had been built by some other of appell nt's employes and used on some other occasion and for some other purpose and that as it was at the place required for the use of appellace the fare an determined to adopt it for present use and that appellee was directed by him to use this platform. Ampellee further claims that Cavanauch was a vice principal and had the power to desi mate what should and should not be used. That the platform no designated by him to be used was weak, defective and unsafe and that he was negligent in furnishing a platform of this character; that the lower side of the board was an it; and defective. that the defect was not open to observation by appellee, that Cayanaugh was negligent in not properly inspecting the board before directing its use. This proposition depends upon the relation that Cavanaugh sustained to appellee. If he was a vice principal then it was his duty to properly inspect the lace or platform before directing his men to use it. "The duty to exercise reasonable care to see that the place furnished for the servent to work is reasonably safe is a contive oblig tion towards a servant and the master is responsible for any failure to discharge that duty, whether he undertakes that berichance perrenally or through another servant. The stater connet divest himself of such duty, and he is responsible as for his own personal negligence for a want of proper caution on the part of his agent." Ress vs. Rosenthab, 160 111., 621.

It was their duty to construct a platform out of the material and a see of acoust this care to the tall the this this the arms of the care o or backering that was not park, which may have prevent and one ed by some one cloe for some other purpose and by so doing avalded the Lawy of workfording a nightern creation to went all bobbs that he had nothing to do with detarming how or when a platform should be built; that the determination to areat a latrotte anner of centing the , ote , were all left to the discretion of the foremen Cavennugh; that the platform used had been built by some stiner of appellint's amployes and used on sade other occasion and for some other purpose and that as it was at the place required for the use of appelled the foremen the section of the party and the party and the depoint of healthweelship Signeted by him to use this pletform specifes farrest sizes case of twee all led dec reliefly only to see the course and troitely and fad? . bear ad for bluede bar bluede fade stangi so designated by him to be used was weak, defective and unuafe and the control a successful at the street as Justian chertab has all in som buned out to able tweel out find 1 100564 ive, that the defect was not open to chestystion by annultes. that Cavanaugh was negligent in not properly inspecting tic board hefore atmosphy (to see,) Trie prompt to describe the relation that Cavanauch sustained to selice. If he was a scale and Josephi glassong of the duty has been the mant lagioning solv at glad form before directing his men to use it. "The anty to a is not bear reasonable care to see that the place ferminished for -or miligate over the same as a single property of the toof while I have not addingered by totake oil bas travior a abrew discourge that duty, whother he undertakes that yer a made perconally or through another servent. The master enough to vilaces himself of such duty, and he is responsible as for his oun ev-The second secon agent. * Ince vs. Samuel Lat 121. . Bill.

It appears from the evidence that Cayanaugh, Stieger, Reed and appellee were all engaged together in performing this work of riveting but the fact that Cavanaugh was engaged at work with the other men would not prevent him from being a viceprincipal in directing and determing the prepar and pecuarary things to do in making preparations to perform the maph. etropolitan West Side Elevated E. R. Co. vs. Skola, 183 111.,454. Chenoweth vs. Burr. 242 Ill., 312. We are of the opinion that the question as to whether of not Cayonauch, under the evidence in this record, was a vice-principal and clothed with the authority to determine what should and what should not be used in the construction of a platform, its manner of construction, etc., was a question of fact for the jury to determine. Annulles says. "Mr. Cavanaugh went with us when we went to get the boards and would tell us which ones to get." In speaking of the board upon which appellee stood at the time of the injury he says, "Cavunnugh said the board was right where we needed it and anid lots get to work. Mr. Stieger and myself got on the board." "Mr. Cavanaugh directed how these scaffolds were to be made: lovenaugh determined what boards to use." "Cavenauch said, here is a board right here where we need it, no use throwing it down and put another one in here; he said, well proceed." William Reeder, another of appeller's withouses testified, that, "Cavonaugh told us what to do." "Te would draw the boards up with rones and lay them on the iron work. Cavanaugh would tell us which boards to take and where to place them. Cavanaugh was giving a me instructions." Again he says, "He told us what to do, where to stand and where to put our rivets. Cavanaugh would come along with us and we would just get a board wherever we could find it, outside the plant or upon the iron work or any place. Sometimes Cayanaugh would say to take a certain board but ordinarily when the four of us went out to find boards any of us would take a board that we thought as all right. It generally

Institute The options That Carrows Street . Mrs - rid unicroluse of redsect begann lie wew selfece but from to tongene and discovered that find the tongener to -selv a maked more and showers for bluck now reads out att wanted by the distriction and adjusted how antiportion of facionize things to do in making preparations to parions the work. . etthe part of the state of the st The same of the sa the question as to whether or not Cavanauch, under the svidence in this dense, was a vice-velocity and al-med end in at how we try allower have tree blanch butter aspectation of of troutle the construction of a platform, its manner of construction, etc., were a climated and and the court of the continuous a sur-"ir. Cavangugh wont with us when we went to type the boards and -nu brand oil to gaineage al ".tog of sone inide au flat bluew on which supelice stood at the time of the injury be cave. "Toyanaugh said the board was right where we needed it und mid lete get to work. Mr. Etlager and myself get on the board." "Tr. Coverney directed how these scaffolds were to be made; Cavenel stel blat dayamande," "Cayamand mind what el stel berter la sel dayamande dayamande dayamanda a band a late base where we need by no one two black by the band a at another one in here; he said, well proceed. " Tillim Leedday, engine of emiliar at beautiful death and the parties of eald us what to do." "we would draw the boarde us with water and lay them on the iron work. Cavenough would tell us which boards to take and where to place them. Cavenough were giving & me instructions. ? Again he cays, "He told us what to do, shore to stand and whore to nut our rivets. Caransum's would come as bines are revered whated a de, dout bloom, an ban an dilw. and. find it, outnide the plant or upon the iron weak or way "lace. bloom to branch which we may a paint or the found branch bed and beautiful bed as to you stand init of the deep to use to use and node gliundi will be a board that we discould now it it is a converty

told us three fellows what to do. We were new men. He told us what to do, where to stand and where to put our rivets." Another witness, Venry Stieger says, "We were sorking under Cavanaugh's instructions. Besides that he was driving rivete; I was sticking in rivets and Clay was bucking up rivets. Bon that morning we found a board, in a nosition to be used by the workmen; we decided to go out on the board. Clay and I walked out and tried it; I said to Cavanaugh that we might as well try it before wege to work on it. He said for us to go out and try it and see if it is all right. Then Clay and I walked out on it; we started out with some 4 x 4; Cavanaugh decided that was too slow work and we commenced using some 2 x 8 and 2 x 10. avanaugh directed us to use that kind of boards." "Cavanaugh would not go with us all the time but if he saw a board was no good he would tell us about it. At this marticular time he told Clay and I to go out on the board and see if it was all right. That is why we went out on the board first. We nade the test and concluded it was all right." Joe Feist, the general foreman of appellant said, "I was foremen over all the en in the building. There were about thirty of them. I didn't have a special foreman warr under me. Te would leave one of the landing iron workers there to look after it; some old son that we knew was all right to break the new ones in. We always have an old man we always keen there and on any job we start we always put an old man there to break the new sen in because new en have to be broke in. Then the men don't obey what the leader tells them the man comes to me and I adjust it symple. Clay was a new man in this line of business. He was there when I gave instructions. All four of them were there and heard what I wanted done. I gave instructions to Clay to get his instructions from Cavanaugh, the driver, as to bucking up rivets, etc. " "He testimony above referred to is practically uncontradicted. The

told us three fellows such to so, we seem now to be told us what to do, where to stand and where to put our rivete. Another pitcees, Fenry Stager and, "he sees record and Coronnell's instructions. Resides that he was driving rivers; not effecting in rivers and Clay was bucking up rivote. Com the morning we found a beardain a position to be used by the and the decided to go out on the bound. "Isy and I walked out and tried it: I said to Covenaugh that we sight say well try yrs for suo on of mu not blue all . it no warm of one wroled it My and see it it is all state, from elem out I maked out in the we started out with some d x do Compressed destroy bearing the and it is a first that it was a point incommon on how draw wall and annually directed on to use that bird of become " -and the same of th good he would tell us about it. At this particular time he told Clar and I to go out on the board and see if it was all mistic. that is why we went out on the board first. We made the tent and quartished it was all child." Jos Tebel, Its seemed littleand it can sti the town names of two It the Antipope To man building. There were about thirty of them. I didn't laws a special foremen ment under me. "e would lenve one of the leading iron workers there to look arear it; some old men that we old men we always been there and on any job we rearn ac clumps THE CAS RESCRIPT OF MAN THE REF SHARES OF PERSON ONE SER, NO. 2012 nave to be broke in. Then the men don't obey wint the leader tells them the man comes to me and I adjust it myrelf. Clay was over I made stails are of business. We were there when I instructions. All four of them were there and heart like I want. done. I gave instructions to Clay to jet instructions from Cavenaugh, the driver, as in harding we sirely, atc. " has land in above referred to is practically uncontradicted. The

foreman, Cavanaugh, was not placed upon the witness stand, and while it is true that Weist denied that Cavenaugh had may authority over either of the other men, other than to say when he wanted rivets, and that all four of the men had equal rights as to the boards for scaffolds, we are of the opinion that the jury were warranted in determining that a yanaugh had and or ercised more authority in this notter than leist was will be to acknowledge when upon the witness stand. The question of Cavannugh's nutwority was submitted to the jury under the iner notions of the court, and the jury of necessity found that he had the authority to determine how, and the manner in which these platforms should be constructed for the use of the men and we cannot say that the finding of the jury in this respect was manifestly against the weight of the evidence. "The determination of one in charge of work is the determination of the master." Metropolitan West Side Blevated R. R. Co. vs. Skola (Supra).

Counsel for appellant also insist that appellant did not furnish the platform upon which appellee stood at the time he fell. We think this question depends entirely upon the relation of Cavanaugh, and if Cavanaugh was a vice principal as has been determined by the jury, then under the evidence, he furnished and directed that this particular plank should be used by appellee in the performance of his work. If Cavanaugh was the representative of the master than he determine to use the board in place as a scaffold would to all intents and purposes be a furnishing thereof by the master.

In the view we take of the finding of the jury as to the finding of facts in this case we doem it unnecessary to determine whether or not the second count of plaintiff's declaration was valid as a statutory count by reason of having neglected to allege that the negligence of appellant was wilful.

It is insisted that the court erred in overruling the ob-

Coreman, Cavanaugh, was not placed upon the witness stand, and way you bad Agusasval tait beineb faiel fait eart at it elid thority over either of the other men, other than to say when he wented rivets, and that all four of the men had equal rights as to the boards for scaffolds, we are of the opinion the Jury were warranted in determining that Cayanaugh had and exeverage entropy by the tale and the same same and acknowledge when upon the witness stool, The year line of least -burgani old rebuy yang set to the jury under the internaima of the court, and the jury of necessity found that he had the authority to determine how, and the manner in which there ow and near should be constructed for the use of the near and un somet say line the fielding of the jury in this respect on mointerity spring the weight of the cylence, "The deletellering or one in charge of work is the determination of the marker." Petropolitan West Side Blevated L. L. Co. vs. Wols('more').

Counsel for appellant also insist that appellant old to trained the country of the performance of his merk, if havened to the country of the marker than the determining in the country of the marker than the determining in the country of the marker than the determining in the country in the country in the country of the marker than the country in the

In the view we take of the finding of the jury as to the finding of the jury as to the finding of factors in this case we does it unmedestrate to determine whether or not the eccord count of plintiff a necloration as valid as a statutory count by reason of having neclorated to that the negligence of any alloce the negligence of any alloce that the negligence of any alloce the negligence of alloce the negligence of any alloce the neglig

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jections of counsel for appellant to the following question:
"Who had charge of that immediate work, if anybody, of riviting the pieces together?" And other questions of like import
and pertaining to the riveting of the pieces together. It is
insisted that the answer to this question calls for a conclusion, and while it is of that character of question yet it was
afterwards fully explained what part Cavanaugh actually took in
this matter. It will be noted that the question here called
upon the witness to tell who had charge of the riveting of the
pieces together. There was no question about this matter, and
as we read this evidence appellant in its testimony took the
position, and showed as far as they could, that Cavanaugh was
in charge of the riveting of the pieces together. We do not
think this, under the state of the record, is error.

Counsel also criticise the admission of the photograph in evidence because it was not sufficiently identified. This it was not identified by the person who actually made the photograph, yet it was identified by appellee in his testimony as being the one taken, and by the doctor as being a true representation of the leg, but the leg was also presented to the jury and even if the photograph was not correct the jury would not be misled by it.

Appellant's next criticism is that the court erred in giving appellac's first instruction, in that it does not subjit the
matter of who give Cavanaugh authority or non no received it, nor
does it distinguish between what constitutes a fellow servent
and a vice principal. Te do not believe the jury could have
been misled as to where the authority must come from as the examination of the witnesses was along the line as to what superintendent Feist did and said in reference to this matter. As
to this instruction not distinguishing between vice principal
and fellow servant this is fully cured by appellee's fifth in-

jections of counsel for appellant to the following question:

"The had charge of that immediate work, if anylody, of riviting the pieces together."

Ing the pieces together."

And other questions of like import and pertaining to the riveting of the pieces together. It is instated that the enswer to this question calls for a conclustion, and while it is of that character of question yet it was afterwards fully explained what part covanges octually took in afterwards fully explained what part covanges of the riveting of the question about this ratter, and pieces together. There was no question about this ratter, and read this evidence appellant in its testimony took that in ities to that (avanates may inition, and showed as far as they could, that (avanates may think this, under the state of the record, is error.

Counsel also criticise the admission of the photograph in the counsel also criticise the counsel and the counsel as the central constant the best the doctor as being a true rearescentation of the leg, but the leg was also presented to the jury and even if the photograph was not correct the jury reals not and even if the photograph was not correct the jury reals not

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etruction which does inform the jury when a fellow rervent or become a vice principal.

We do not think the criticism upon appellee's second instruction is well taken as, if for no other reason, the risks referred to end as applied to the facts in this case were fully explained in appellant's ninth instruction.

As to appellee's third instruction, appellant in its crisicism says "It did not exclude the assumed risk that sould arise by season of appellee knowing either actually or constructively that the board was one that had not been furnished by appellant for appellee's use and that in using a board not furnished for his use he assumed the risk of using such a board."
he cannot see why this instruction should exclude the assumption
of risk of a board flor furnished for his use as the instruction
pertains alone to the board furnished by appellant.

As to the criticism of appellee's fifth instruction, we agree with counsel that the language used is not very satily chosen but under the evidence in this case we do not see that it was misleading and it was certainly not so erroneous actors wire a reversal of the case.

The criticism upon appellant's refused instructions seventeen and eighteen is not well taken for the reason that if under
the evidence it appeared to the jury that Cavanaugh was a vice
principal and directed appellee to work upon this particular platform as claimed, that any test made by appellee could not af itself be conclusive against him as he was also entitled to the
benefit of the superior knowledge and necessary inspection of the
time vice principal as to the conditions not apparent and known
to appellee.

It appears to us from an examination of this whole record that, the vital question in this case is, as Cavenaugh a recrease-ative of appellant in directing the use of this beard as a plat-

etruction which does inform the jury when a fellow servent may become a vice principal.

We do not think the critician upon appelled's second instruction is well taken as, if for no other reason, the ricks referred to and as applied to the facts in this case were fuling explained in appellant's minth instruction.

As to appellee's third instruction, empellment in its oriselet.

Let.

As to the criticism of ambelled's fifth instruction, so exervity county and an but under the evidence in this case we do not see that it may misleading and it was certainly not so erroseous " in retain reversal of the case.

The criticism upon appealised's rejured instructions eventeen and eighteen is not well taken for the research that if under
the evidence it appeared to the jury that Cavenugh one a vice
rincipal and directed appealies to verk upon this marticular classism, as claimed, that eny test under by encelles could not it itent as claimed, that may test under by encelles could not it itent as countries the superior knowledge and necessary investion of the
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It appears to us from an exection of this whole record that, the vital cuestion in this case is, was forement a responsistive of appellant in directing the use of this board as a vistform upon which to work? Which, under the evidence, became a question of fact to be submitted to the jury and it having been determined by the jury that he was the representative of appellant we cannot say that its finding upon this question and its conclusion, that appellant was liable for the injuries received by appellee, was manifestly against the weight of the evidence, and we have no right to disturb the verdict and judgment of the court. The judgment is affirmed.

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(Not to be reported in full.)

int upon the jury that he was the representative of conclusion, that appellant was limble for the injuries of the conclusion, that appellant was limble for the injuries to a signal vice weight of the court of the court, the judgment is allieved.

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May,
A. D. 1914. A. C. Millebaugh

Clerk of the Appellate Court.

OPINION

146 A 508



Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

P_{i}	re	s	e	n	ŧ.	

Hon. Harry Higbee. Presiding Justice. Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

186 I.A. 508

A. C. MILLSPAUGH, Clerk.	W. S. PAYNE, Sheriff.
	h term, to-wit: On the day e Clerk of said Court at Mt. Vernon, Illinois, an
Stalbut adm. Est. Patome.	ERROR TO APPEAL FROM
vs.	City COURT
ATT RREI	

TRIAL JUDGE

Hon PH Flauresan



October Term. A. D. 1913.

William U. Halbert, Administrator of the estate of Jessie Potoma, Appellee,

VB.

Louisvill® Rashville Railroad Company, Appellant.

Appeal from City Court of East St.Louis.

186 I.A. 508

McBride, F.J.

Appellee obtained judgment in the city court of hast st. Louis, Illineis, for three thousand dollars which appelled seeks by this appeal to reverse.

On and prior to May 15, 1912, the appellant was operating its railroad through the city of Mast St. Louis and in conduct ing its business through said city had built a great number of tracks, about fifteen in all, across a street known as Bt. Louis That in order to cross said street it became necessary to fill it, at the place where the said crossings were made, and consent of the city council of Last St. Louis was procured and an ordinance passed prmitting the construction of said tracks upon the condition that the said Railroad Company constructed suitable street crossings at the intersection of its track with said Avenue by planking, etc., so that the tracks may be easily and conveniently crossed at said point, and maintain and keep said crossings in good repair. The railroad lines above mentioned crossed this street between first and second streets. The railroad company constructed an approach from second street by which the level of the grade could be reached. This approach was of the width of about sixteen feet and was constructed on the south side of St. Louis Avenue, and planke of the length of

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about sixteen feet were laid along the several rails constituting the several switches, and on the south side of said avenue, so that teams could be driven across these tracks then required. The width of St. Louis Avenue was eighty feet. It appears that the embankment which was reached by this approach was of the height of three or four feet. St. Louis Avenue extended east and west and the several railroad tracks crossed this avenue practically north and south. On the day is guesation Anna Belle Potoma and her daughter Jessie Way Potoma, who was of the age of four years, had been visiting Irs. Potoma's mother and doing some shopping in East St. Louis and were returning to their home which was west of the place where the railroad crosses St. Louis avenue, and in returning to their nome they passed along St. Louis avenue, ascended the approach above described and at about the time they reached the second of acpellant's railroad tracks a train of cars had passed to the south along the second track, from the north, which the witnesses speak of as being track No. 15. The train consisted of seven or eight freight cars and stopped with the rear car practically, if net all, upon the planking above described. The mother and caughter waited a minute or two for this car to get out of the way but it did not move and they passed around the north or rear and of the car attempting to cross over the tracks and as they were passing, the cars were suddenly backed up and, the shild was run ever by the wheel of the car, which resulted in its death. The evidence upon the part of appellee tends to show that no worning was given, no brakeman there to prevent persons from attending to cross over, that no bell was rung upon the engine or whichle blown and that the sudden and unexpected accement of the care was se negligent as to cause appellant to be remonsible for the injury. While upon the other hand the evidence of appellant tends to show that a bell was ringing, that a brakeman was just beyond

-trans aixteen feet were laid along the several rails constituting the several switches, and on the south side of said avenue, so that teams could be driven across those tracks than required. The width of St. Louis Avenue was sighty feet. It where that the cabahlment which was reached by this approach was of the height of three or four feet. St. Louis Avenue enbearors exact boorlier Israyes wit has team ban tage behast -acco mi was oratically north and south. On the day in quastion Anna Selle Fotome and her daughter Jessie Fay lotome, who was of the age of four years, had been visiting live. Fotome's action and doing some shopping in East 51. Louis and were ratura--list eds erem socia ent to seew cow doids ened rieds of and road crosses St. Louis avenue, and in returning to their hore they passed along St. Louis avenue, ascended the approach above as in impose mid bendery your sair and funds to bon bediroess Miss of of beeng bad erao to mist a skeat baotlist a'imiles miong the second track, from the north, which the witnesses spenk of we being brack No. 15. The train consisted of seven or sight freight care and etopped with the rear our procisally, if not all, upon the planting above described; The mother and described you sait to tue tog of the car this car to funda a bottow to! hee ther to alton and havors buspay made has swon but his FI bad erew quit as big siest sit revo esore of guitquests rae out to passing, the care were suddenly backed up upd, the child we gue dissb sti ni belluser daidw , ree and to Leedw edt yd Torio mintow on Jail works of abner selfounce to frag only month or wallend was given, no brakemen there to prevent nersons from attam ting of this we enigne out mon unu new fled on test, rave seems of ear area out to inemerom beinggroup bus nebbus out ight bus awold so negligent as to cause appellant to be responsible for the inting the upon the other bad the evidence of any other. theyad fourt asw measured a feet a prigair esw flad a funt wode of

the end of the car throwing a switch preparatory to letting these cars in upon another track, that a lamp lighter who was close by warned the mother not to cross and the foreman of the crew, who was giving the signals, claims to have been standing at a point where he could see the rear end of this car and the engineer and that between the time he gave the signal to back up and the movement of the car that the mother and shild came around from the east side going west and were caught and the ohild injured before the train could be stopped. The mother emplains that the motion of the lamp lighter made to her was an invitation to come across, at least she so understood it. This train of cars was engaged in switching.

The declaration charges that on May 15, 1912, plaintiff's intestate Jessie Fotoms, who was an infant of the age of four years, then in the care and custody of her mother, was crossing the railroad tracks of the defendant upon said public highway when one of defendant's freight trains that was standing partly over said crossing was by the servants in charge thereof suddenly, negligently and carelessly backed over said crossing and against plaintiff's intestate while the mother of plaintiff's intestate was in the exercise of due care and caution for the safety of the deceased.

It is contended by counsel for appellant in the argument of this case that the appellant and its employes were not guilty of the negligence which caused the injury of the deceased and that the mother of the deceased was not in the exercise of due care for the safety of the child in attempting to cross so near the end of the car and at a paoint north of the planked crossing. These two questions have been treated separately by counsel in their briefs but the several acts of appellant and of the matter of deceased are so closely associated one with the other, and the law applicable to both questions being the same, the two will

the end of the continue track, that I am lighter no continues of the continues of the continues of the continues of the continues, who was giving the signals, claims to have been standing at a point where he could see the rear end of this car and the angineer and that between the time he gave the signal to back apand the movement of the ear that the notiner and cilld care around from the cast side going west and were caught and the child inform the cast side going west and were caught and the child informed before the train could be stopped. The motion explains that the motion of the law lighter made to her was an invitation to come across, at least size so underwood it. This train to come across, at least size so underwood it. This train

The declaration charges that on May 15, 1912, plaintiff's intentity Joseph Fitter. Now we was the control of her mother, was erossing the relief of the declaration of the determine the control of the determine the control of the co

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be considered together. The testimony of Anna Belle Totoms. .other of the deceased, is that as they were returning home from the city they ascended this approach and upon reaching the second of appellant's tracks found a car standing partly over the planked crossing; that this was the rear car of a freight train of seven or eight cars, that it had just nassed to the south. That there were several feet between the narth and of this car and the north end of the planked crossing. That after waiting a minute or two the train sade no movement; that the man engaged in the lighting of lamps near by her, as she understood it, motioned to her to come across the track; that there was no one except the lamp lighter near the rear and of the train and that there was no one on the car. That when the limiter motioned to her she understood this action to be for her to come across and that she and her daughter is ediately started to cross the tracks; that in crossing the tracks they proved three or four feet north of the rear and of this car and, as she claims, upon the planked way, and when they had gotten fairly upon the track the train suddenly and without any warning of any kind backedup to the north, ran over the child and injured it. S he and the lamp lighter both attempted to save the life of the child and in this attempt ran together and as the result neither were able to save the child. She also testifies that no bell was rung or whistle sounded before the train started to move back. Other witnesses testify that the car was between the foreman, who gave the signals to move the train, and the mather; the foreman being upon the west and the mother upon the cast side. Other testimony is to the effect that when the mother attempted to pass around the north side she was carrying some bundles and did not have hold of the child's kand; that she passed off of the planking but was still in the street. The witness Endler

be concidered together. The testinony of Arms Bells wise. making of the decement, is that as they sore returning home from the sate they necessaid this approach and upon reaching the mayo allyon aniboute too a bourd atmost a been to become the planked crossing; that this was the rear ear of a freight odi of beens or sight cars, that it had just cares of alers .djuoa That there were several feet between the north and of this car and the north end of the clouded crossing. They allor now and Janily Januaron on about plant and new to adjust a guidlant engaged in the lighting of lamps mans or her, as the underwiped it, metianed to ber to come norose the trank; that there was pleas and to bue tees old year raidall qual and squore and on and that there was no one on the dar. That when the last twint er melloned to her she understood this melias to be for her to berrare vintaibami rezdunab umi bus ede tent bus sustan euco to cross the trucks; that in crossing the truck that company three or four feet north of the rear end of this car and, as she clula, upon the planked way, and when they had sotten fairly upon the track the train suchenly and without may service of any kind backedup to the north, ran over the child and injured it. S he and the lamp lighter both attempted to save the life of tha without lives sell on him parity out foundle will at how bilds ur ware able to save the child, one also testifies that he beil was rung or whistle counded colors the main elarged to Gre Other withous and ind the per see between the lowand who gave the signals to move the train, and the mother; the or ... being upon the west and the mother upon the east side. Other testimony is to the effect that when the motion at tempical Do sellend once univarso see one old diren all benero mose of To The besses one fant; bund o'bline out to blod even fon bib rolbat ssoutiw ser . Jostfa edf at Ilite new jud gathalq edf

stated that he saw the lamp lighter make the motion to the woman and that he took the motion to be for her to stud sick and not try to pass over. The mother states that she know the engine was attached to the cars but did not know it was liable to move back any moment and did not think it would come bob. Another witness introduced by appellee by the name of Orace in Marmon testified that the child was run over about two feet south of the north end of the planking. The evidence further discloses that this street was used to considerable extent for fact passengers but very little for teams. The testimony of the engineer and fireman, witnesses introduced by appellant. state that the bell upon the engine was ringing, that it was ringing as the train went down towards the south, and while the train stood there and while it was backing, that the ringing was produced by an automatic ringer; that they knew nothing of the woman and child being upon the tracks until efter the injury and the engineer says he was backing the train in accordance with the signals given to him by the foreman bringer. Irlinger. er testifies that before and at the time of the injury he stood about sixty feet from the train so as to see the engineer and was in a position that he could see the rear end of the car that stood upon the crossing and that between the time that he we the signal to the engineer to back up and the time the train commenced backing he saw the woman and child pass around on the wast side of the rear car and immediately gave the energency signal and the engineer immediately and quickly applied the energency brake and stopped the train within a distance of eight or ten feet and that had it not been for the slack in the couplings they would have been able to have saved the child. John Jenking, the land lighter, testified that the car was about three feet porth of the crossing and that he saw her attempt to pass over and he mationed

stated that he saw the law lighter make the motion to the women and that he took the motion to be for her to stand back and not try to ness over. The mother states that she knew the sideil and it would not bib jud ares out of bedeette and enlare to move back any moment and did not think it would come book. Another witness introduced by appellae by the name of Grace inc soot out from reve nur was blide and that beiltiest mearail nouth of the north and of the planking. The evidence further Tol thethe aldereblance of been sur forth aid tolt carologib foot:passengers but very little for teams. The testinony of the engineer and fireman, witnesses introduced by annual STATE that the told mode the confirm see Indian the I all mis ringing as the train wont down towards the south, and while the train stood there and while it was backing, that the ringing was produced by an automatic ringer; that they have nothing if the women and child being upon the transa wall ofter the injury and the engineer says he was bucking the train in accordance - with the signal a given to him by the forenn aringer. Mringder testifies that before and at the time of the injury he stead but receipes out one of as os niert suit mort teef winte fuods was in a position that he could see the rear end of the car that eyes and that the crossing and that between the time that he gaye the signal to the engineer to back up and the time the train semmonoed backing he was the women and child pass around on the our side of the year car and immediately gave the energency signal and with contrary we bridge circum hus clarathead twatters with bus seek net to times to sential a middle start out because bus bluer year to and lead and alack and to the bad to all have been able to have anved the child. John Joshins, the lame lighter, testified that the car was about three feet north of the creation ad bar rove asag or sample red was ad that bas gaineous

and then came on. George Elliott, a switchman whose affidavit was read as his evidence, states that he saw the deceased and her mother standing at the track as the cars passed by them and he told the mother of the deceased not to cross the track, and he told Jenkins the lamp lighter, not to let her cross the tracks; that he then walked up two car lengths from the rear car to cut off two cars that were going to be placed on track Ws. It in said yards and that he was ready to make the cut when the train backed. Ers. Potoma denies that this witness made any such statement to her or that any one told her not to cross the tracks; and it is conceded that the witness Jenkins does not remember of Elliott saying anything of the kind to him.

Counsel for appellant in his argument contends that in ne much as the accident happened north of this board crossing that it was necessarily negligence upon the part of the mother to pass around the train north of the board crossing. It appears, however, from the evidence that notwithstanding the accident may have happened north of the board crossing it was still in the street, and we can see no reason why she would be contined in her travel more to one part of the street than another. The had as much right upon St. Louis Avenue as the Railroad Company had to be there with its cars. It was a public street and its use by the Company was subject to the right of the gameral public to use it. Where Railroad Companies cover a public street with a large number of tracks they must observe unusual care and take extra precautions to avoid injuries to persons passing along the street or side walk. L. S. & M. S. Ry. Co. vs. Johnson, 135 111., 641. In the permission granted to appellant to fill in the street and use it for a crossing by its railroads. It undertook and agreed to keep it in reasonable condition for ir vel

Counsel for appellant in his crystent contends that in as year accounts brook aims to distant beautiques Junbique aid on down is was assessed in the same about the same as the section to pass avoid the train north of the north drawelms. It spouds, limited and anthentally not and sounding the sery, from the ni Ilita eaw it gateers based old to Afren beapponed bank and may the street, and we can see no reason why she would be confined in her travel more to one part of the etrept than another. The and as much right upon St. Louis Avenue at the hailroad Company not had seenth allder a age if . eras att mitte eract of of had use by the Company was subject to the right of the general oulic to use it. Where Railroad Companies cover a public street will a lange number of tracks they make charge under all the take extra precautions to avoid injuries to persons passing along the street or gide walk. I. S. & . S. Ty. co. vs. Johnson, 135 111.; 641. In the permised on granted to suscilant to fill in the street and use it for a crossing by its railroads, it Invert on agreed to keep it is reasonable condition for invert

The circumstances as detailed by the several witnesses are conflicting and if the evidence of the witnesses for appellee is to be taken as true then the appollant was guilty of suddenly, negligently and carelessly backing over said organing, as charged in the declaration. While it appears from the testimony of the foreman that the mother approached the track between the time he gave the signal and the time the train or menced to back, yet if the lamp lighter gave her a signal or the understood the signal given by the lamp lighter to erose over, and no warning was given that they were about to back the trangage claimed by appellee's witnesses, then the jury sould be surranted in finding that the mother of the deceased was in the swercise of due care. If the train was standing still at the time the mother attenuted to pass over the track she would not as a matter of law be thereby guilty of negligence but it is a question of fact for the jury to determine under all the circumstanc-C. & R. I. R. R. vs. Filler, 195 Ill., 9. We must admit that the cases of Chicago Terminal Transfer Co. vo. Belbreg. 174 App., 113, and Chicago Terminal Trans. R. R. Co. vs. Morando, 199 App., 620, cited by counsel for appellant seem to sustain his contention in this case but as we understand the rule of law as laid down by the Supreme Court, where the evidence is of the character of that introduced upon the trial of this case, that it necessarily becomes a question for the jury to determine that is negligence of the defendant and due care of the plainting: where the facts are fully and fairly before the jury they should be left to determine from all of the circumstances whether the appellant was guilty of negligence or the appeller of sont of due care, and this doctrine is fully sustained by the care if Chi. Ailwaukee a St. Faul Ly. Co. vs. halsey, Admr., 122 711., 246; Ill. Central ". R. Co. vs. Cregin, 71 Ill., 183; Chicago tlant-

The circumstances a detailed by the severa of the second conflicting and it the evidence of the pricesses for severing is to be taken as true then the appellant was pully of suddenly, negligantly and ensulemely backing over mid eroming, an charged in the declaration. while it supears from the testinew set town! and become any in a that the control of the town tion the paye the signal and the tion tests communed to book, yet if the lamp lighter gave her a cignal or the understood the signal given by the lamp lighter to cross over, and no warning was given that they were about to back the train, as stated by appeller's edimensus, then the jury would be warneded in finding that the mother of the deceased was in the exercase of the Clife guidasts saw miert and II . eres out to este the mother attempted to pass over the track che would not as a matter of law he thereby guilty of negligence but It was a quection of fact for the jury to determine under all the singunatene-Unt the cases of Chicago Terminal Transfer Co. vs. helberg, 174 Apply 112, and Chinger Taxabonl France, L. Co. so. Coronda, 118 App., 620, cited by coursel for speciant seem to sustain him contention in this case, but as we understand the rule of law as laid down by the Supreme Court, where the evidence is of the character of that introduced upon the trial of this case, thet it necessarily becomes a question for the jury to determine what is negligence of the dusquient and due care of the plaintiff; where the facts are fully and feirly before the jury they should be loft to determine from all of the circumstances wisting appellant was guilty of negligence or the appelled of wont of to sure and this doctrine is tally sustained by the case of The Blanch of the Part of the Part of the State of the St IXI. Canisal ". R. Co. va. Casgin, T. XIX., DG, Science of Cited

ic Ry. Co. vs. Carey, 115 Ill., 115; and many other cases that might be cited. While there is room for disputeas to what is the true status of the parties in this case, yet we feel that the verdict of the jury under the circumstances must settle it and that we are not warranted in saying that the verdict is so manifestly against the weight of the evidence as to cause us to disturb the verdict.

It is next contended by counsel for appellant that the damages given by the jury are excessive. There was no evidence introduced as to the condition of the child's health or ata promises intellectually or otherwise but only that a child of the age of four years was killed, and while we would have been better satisfied with a verdict for a less amount, yet there is no data given as to the child's future, no improper evidence or instructions of the court upon this question and no recom that we can see to cause the jury to exercise other than its best judgment as to the amount of darages, and it became a matter solely for the jury. It is said in the case of B. & H. S. Ry. Co. vs. Then, 159 Ill., 539, "Now this pecuniary damage is to be measured, - in other words, what is to be the amount of the verdict, - must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has w used language which seems to recognize the difficulty of exact measurement, and commits the question especially to the finding of the jury." And again in the case of City of Chicago vo. Mesing, 83 Ill., 204, it is said, "When proof is made of the age and relationship of the deceased to the next of kin, the jury may extimate the pecuniary damages from the facts proven, in connection with their own knowledge and experience in relation to matters of common observation. This was a question for the jury, subject to review only when it appears from the record

is he, do, we carey, lis ill., lis; and many other decention in it, it is ested, while there is not listed in this above, yet as feel that the verdict of the parties in this above, yet as feel that the verdict of the directors and that we are not warranted in caying that the verdict that an anticetic against the verdict the disturb the verdict.

all dear familiage and deaning of behadings from at \$1 desires are siven by the jury are excessive. There was no evidence ati to dileso a'blino od to notibe cont of as beoutering To billio a Paul atho Fud salennilo un alleunellaini asalenne the age of four years was killed, and while we would have been better satisfied with a wordlot for a less amount, yet there is oo data given as to the child's future, no improper evidence or instructions of the court upon this question and no remen sti much resite ealerse of yary est cause of see and a di ted judgment as to the amount of demages, and it became a make Wer solely for the jury. It is sold in the owes of h. s f. Mr. Co. vs. Then, 159 Ill., 539, "How this pecuniary denges is to faucuse said of at fadar abrow realto ni - , berussem of et the verdict. - must be largely left (within the limits of the statute) to the discretion of the jury. The legislature las 180 found to willyolitib out extensors of among dollar energial book manusconco, and committee the question aspecially to the finding and angin in the ease of City of Chicago vo. of the jury. We ing, 83 Ill., 204, it is said, "When proof is made of the ago and relationable of the descent to the sent of the, one just may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experience at relativity metters of common observation." This was a question it the jury, subject to review only when it appears from the record

that the jury has from some cause over estimated the recumiary value of the life of the deceased.

The next contention is, that the court erred in grating appellee's third instruction, in this, that the instruction might be construed by the jury, "To include the time before she went upon the track, and so excuse her passing off of the crossing and going too close to the end of the car. Also that the instruction was leveled at the care of the motion for her own safety and not for the safety of the child. To do not believe that this instruction is subject to the criticism offered. It had reference not only to the time that she was about to cross the track but while she was crossing and also to the accept of the child, and we think it could not be risunderstood as to what was meant by the peril referred to in the instruction.

The criticism made upon the ninth instruction is not old taken as it directs that the damages sustained must be ascertained from the evidence and under the instructions of the court. "he next instruction complained of tells the jury that the plaintiff is only entitled to recover for the necuniary injury.

The criticism upon the refusal of the court to pive annullant's second refused instruction is without serit as the instruction was clearly wrong, in this, that it pointed out certain particular things that the mother would have to do in order to relieve herself of contributory negligence. It is not proper to direct what particular things she should are should not do to constitute a want of due care, as this is a matter to be determined from the whole evidence in the case and not from any particular

We have carefully considered this record and are unable to say that the verdict of the jury is manifestly against the weight of the evidence or that the court erred in any of the instructions criticised and as we view it the judgment of the lower court must be affirmed.

facts or circumstances.

JUBOUTH ATTEMED.

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ties the fury one five some cours over at limited Un named to value of the life of the deceased.

The next contention is, that the court erred in presenting appellee's third instruction, in this, that the instruction might be construed by the jury, "To include the time before ant went inon the track, and so excuse her passing off of the crosssaft tools outs ". The east to bue edd of eacla out maion but all and and not residen and le east ait is beleval sew nothing and sufety and not for the safety of the child. We do not believe this instruction is subject to the criticism offered. and to the contract of the city and the contract of the contract of to track but this male bus male or see she blike but bort out the child, and we think it could not be misunderstood as to wast was meant by the peril referred to in the inetruction.

flow Jon et moitourient minim edt menu eben metalite edt : " ! taken as it directs that the descrive evaluation out to putte . June all to undrawer and upday has sometime and merical add jadd yrut add allad to benislamon notiourfant from out Interior to only satisfied to recover for the pecuniary injury.

The graduate man the perhaps of the court le sive and suff as firms funditive at noitheath and beauter brooms at interest and structi u ese claurio erona, in this, thet in pointed and metalia of the at the at went blues traiters and had suntill refuelless relieve herself of contributory negligence. It is not preper to -are as ab for blusta to bluste see sprint refusiting forly footb stitute a want of due care, as this is a matter to be determined from the whole evidence in the case and not from any particular

facts or eircumstances.

We have carefully considered this record but are unable to July and tentone vilgerians at vivi eld to soibter out July vee of the syddings or that the court speed or my of the tenting in Jame stung who i aid to dame but sait if wely on as bus besloid to De alliged,

⁽Not to be reported in full.) 1-1-1-1-1-

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May,
A. D. 1914. A. C. Millsbaugh Clerk of the Appellate Court.
Clerk of the Appellate Court.

OPINION

Opinion of the Appellate Court

- Material Control	
	eld at Mt. Vernon, Illinois, on the Fourth Tuesda
in the month of March in the year of our Lord, one th	
ing the 24th day of March, in the year of our Lord, or	ne thousand nine hundred/ond fourteen.
Present:	/
Hon. Harry Higbee. Presiding Justice.	/
Hon. James C. McBride, Justice.	/ /
Hon. Thos. M. Harris, Justice.	,
A. C. MILLSPAUGH, Clerk.	W. S. PAYNE, Sheriff.
A.	'
And afterwards in Vacation, after said March	
of May, A. D. 1914, there was filed in the office of the	Clerk of said Court at Mt. Vernon, Illinois, as
OPINION in the words and figures following:	
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TRIAL JUDGE



October Term, A. D. 1913.

H. G. Davis, W. H. Lampley and Douglas Whittington, Appellees. VS.

John H. Willmore and John Staphen, Appellants. Appeal from the Circuit Court of Franklin County.

186 I.A. 510

WeBride, T.J.

This was a proceeding brought by appellee as sub contractor to enforce a materialmen's lien against the property of namellast. A decree was rendered in favor of appellee. The bill alleges that on or about the 10th day of June, 1912, John I. illmore, a contractor, entered into a contract with appellant to erect and com lete a house for appellant on lot 6 Block II, in Lindsays First Addition to the town of Lindsay, Franklin County, Illinois, and that appellant John Staphen was then and is now the owner of said premises. That immediately after entering into such contract the s id John h. Willmore entered into an agreement with appellee to furnish the building materials to be used in the erection and completion of said dwelling house which was then being constructed. That no particular amount of lumber or tother ax building material was specifically contracted for but that annellee was to furnish such lumber and caterials as the said illere would from time to time need in the erection and construction of said dwelling house. That immediately after withe making of such centract appelless commenced the furnishing of such building materials and continued to furnish and supply said will are with such materials as were needed until July 19, 1912, at hich time the last delivery of building materials was made; and then average that building materials were supplied by the appelled to the amount of \$502.09 which is due and unpaid. That on the 11th day

Colober Term, d. h. 1911;

M. G. Davis, W. M. Lampley and Dauglas Whitington, Appelless,

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John H. Willmore and John Staphen,

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186 I.A. 510

Language Language

This was a proceeding brought by ambelled as out corirotor -ies . To yjragora edi josispe neli s'anaderizza e cororre ling. A decree was rendered in favor to appeller. alleges that on or about the 10th day of June, 1912, Inch H. iti mere, a contractor, entered into a contract with appellant to erect and complete a house for appellant on let & block 21, in Lindsays First Addition to the town of Lindsay, Franklin County, Illinois, and that appellant John Staphen was then and is now the owner of said premises. That immediately efter entering into ence contract the said folm H. Willmore entered into as agreement with appellee to furnish the building materials to be used in the ermired went new dother equal paillers bire to molisi mae bue noises was to look to todays in the the angular of the to before the building material was specifically contracted for but that appealprovide turnish such lumber bar selfit of any selfit black of any selfit black of the le anticurteure bar neiteere end in been sait of emil mort bluow into It marine some rests yels the that the more necessary bise contract appelless commenced the furnishing of such building : ... terials and continued to furnish and monely end willow with such materials as were needed until July 15, 1912, at hick tive the last deal very of building materials was made; and then ever the state of the safe and the period of the state of the state of the safe of amount of 1502.09 which is due and unuedd. That on the 1111 day

of September, 1917, he served a netice for sub-contractor's lien upon annellant. Athe appellant filed an answer to this bill and admits having entered into a contract with the said John M. Willmore for the erection of said building and that the appellees contracted with said John H. Willmore for the sale to him of lumber and other building materials to be used in the construction of such dwelling house upon said lot, and that the building material placed in said building was worth \$502.09. Inot a written notice in due form for sub contractor's lien was served upon appellant on September 11, 1912, but denies that said antice was served within sixty days after the delivery of said material was completed, and desies that said notice was served as required by the statute on liens. Later the appellant filed an answer to appelless amended bill in which he denies the contract of appellees with W illaste and denies that any material furnished by appellers was placed in said building, and denies the eervice of said notice, and denies that he owes appelled any mount whatever, but avers that the building material furnished by anpellees has been shelly paid by the said willmore, and avery that he has paid to said willmore the full price agreed upon for the erection and completion of said building. The cause was heard and testimony taken in onen court and a decree rendered in facor of appelless for \$450.79, which is declared to be a lien upon the premises in question.

It appears from the testimony of appellee and illmore that a written contract was entered into between illmore and annullant whereby on June 10, 1912, sillmore agreed to build and complete for appellant the house in question, for which appellant agreed to pay him 750,00, one-third thereof to be paid when the house was inclosed and the balance when the house was completed, and that the house was to be finished and later than July 10th, and that the house was completed on about the 20th day of July,

of Mantember, 1912, he served a motice for sub-contractor's lien unon appellant. Athe appellant filed an answer to this bill and admits having entered into a contract with the said John N. Willseallance and that he amidding bire to meeting and the orem contracted with said John M. Tillmore for the sale to him of -aurignes and other building materials to be used in the congruetion of such dwelling house upon said lot, and that the building material placed in said building was worth 1503.03. barron new meil a rojectings due to't aro't sub at estion neffirm won appoilant on deptember 11, 1912, but denies that will notice was served within sixty days efter the delivery of wid anterial was completed, and Rairs that and notice was perved as required by the statute on liens, later the movellest filed on answer to appellees amonded bill in which he denies the contract of uppellocs with W illmore and denies that any material turnianed by appellees was placed in said building, and denies the service of said notice, and denies that he eves appellees any mount where y' bedefare' latretas multing eat tail areve jud , reveran polices has been shelly paid by the pold tellman, and desire rel nove beares soirs Ifthe out organized bise of him and selfails ear erons en' .mailflud bis: To meidelimes has nelfears all heard and testimony taken in a on cours and a server reading the facor of appellees for \$450.79, which is declared to be a tion unon the premises in question.

1912. It further appears from the testimony that shortly after the making of said contract to erect said house, illacre contracted with appellees to furnish the building meterial to be used in the erection and completion of this building, for which he was to pay what such building material was reasonably warth; that appelless commenced furnishing the building material contracted for on June 17th, 1919, and from time to time furnished such materials as were requested by illmore, and that - elless completed the delivery of such materials on July 19, 1913. It further appears that appellant paid illmore substantially the whole of the contract price for the erection of such building and that such payments were made at different times, the last payment having been made on August 20,1913, but it does not apnear what the last payment amountedto. It further appears from the evidence that appellees served a written notice as sub contractor in the manner required by statute upon appellant on Teptember 11, 1912, advising appellant that they had been apployed by John H. Willmore to furnish lumber and building material for said building under his contract for the erection of a house upon said lot, and that there was then due them . 50 .00. lant offered no evidence disputing the facts as testified to and above set forth but contends that in as much as the a researt between him and willmore was that the said willhore was, "To prowide at his own expense all the labor and material necessary, and erect, build andfinish in workmanlike manner a frame dwelling house on lot 6, etc.", that this provision in the contract in effect worked a waiver of any lien of the contractor, and also had the effect of defeating appellees' lien as such sub-contractor, and invokes as an authority to sustain this contention the case of Lelley vs. Johnson, 251 111., 135. As we understand the case referred to, the question there determined by the court was that where a contractor had expressly waived a lien that such

TALLS OF FERLINE Appends from the North Court of Courts of Courts the making of said contract to erect said house, villacre coned of Introduce anibility of the interest of the series and is bettern used in the erection and completion of this building, for which iditow videnceses asw Laireton unibility wous tady you of you of that appellees accomenced furnitehing the building meterial con--drings on June 17th, 1912, and tout seek to the tout ed such materials as were requested by Villmore, and that marelleas completed the delivery of such meterials on July 18, 1912. "Tiesto-ration attendate along the language their stanger watered #1 the whole of the contract price for the exection of such building and that such payments were unde at different times, the last sugment having been made on August 20,1912, but it does not apsear what the last payment amountedto. It further annears from -nes due un estica nestitu a beyree asellegge sadt comebiye ent tractor in the manner required by statute upon appellant on Seg-Large and bed bed that that the they be adopt the light they be an inches by John H. Willmore to furnish lumber and building material for said building under his contract for the erection of a house upon said lot, and that there was then due them 1508.98. Angelbac or butilises as ajout and antiquetto sensitive on bereito incl the series and as home as at that shooten out street to evede -ern e?" sew growlitt bing od: 3 di gen groulfit ban mid mewbod buc, yrac sees all train and read it its sensons me aid it ship galileve swort a reman sathanairew at dainithme blind ,toore Bouse on lot 6, etc.", that this provising in the centred in effect worked a walver of any lies of the contractor, and also -Jear Jeon-dur Mour en meil 'esellonne guidesteb la teste ent bed on, and invokes as an authority to motals this contention the case of Kelley vs. Johnson, Nol 311., los. As we understone the one referred to, the question there determined by the ocure was lowe I wit well a borier viscoreno bad rejourince a gredy fail

waiver had the effect of defeating any sub-centractor's lian. where such sub-contractor was sade after the univer but did not offect sub-contracts made prior to the waiver. As we read the contract in this case, and the clause above referred to the relied upon by counsel for appellant, it was in no senner a waiver of a lien or any pretense of such waiver. It cannot be said that simply because illmore agreed to formish all naterial, lumber and labor, at his own expense, and deliver the house in question to appellant, that either one of the parties understood thereby that any liens or rights that they had were waived. e concede that the care above referred to holds, in effect, that where a contractor expressly waives his lien that the effect of it is to defeat the sub-contractor's lien but we do not believe that the language above referred to has the effect of wai ing the lien by the original contractor. It is suggested by counsel for appellant that appelled did not inquire into the pature of the contract entered into between annellant and illegre and therefore his rights were not protected under it. The only effect that a failure upon the part of appelled as sub-contractor, to investigate the contract entered into between uppellant and illmore ould be that he would incur the risk of such contractor having waived such liens.

It is again contended by counsel for appellant that the evidence of appellee shows that the lumber was furnished to him from year to year upon a general open account; we do not in any manner disputed is, that he contracted with Tillmore to furnish the building material for this particular house, and tentified that such materials were charged upon his books as an account to "John H. Tillmore, the job to be Turkher appears from the evidence that the materials furnished by appelates were actually used in the construction of such building at

waiver had the offect of defeating any sub-contractor's lies. don bit dud rowles and redle show any medacrines-due done erede effect sub-contracts unde prior to the wriver. As we read the contract in this case, and the clause above referred to and relied upon by counsel for appellant, it was in no muner a waiver of a lien or any pretense of such waiver. It cannot be fair that fir detart of berry errolling account plant for the lumber; and labor, at his own expense, and daliver the house in booler that asiting still one and it that the sarties and incident thereby that any liens or rights that they had more unived. . e cancede that the case above referred to holds, in effect, that To footle out Just well aid noview glassique vojourinos a erode availed for oh aw fud call a reformacedus and fasted of at 11 sait guiview le deelle out and et beareler evede egougest edt ladt lien by the original contractor. It is suggested by counsel for suffered that earlies old actinguist and the series of the legge -erad) bus growill bas inclinges asowied ofat bereine jostinos fore his rights were not protected under it. The only offect that a failure upon the part of appealage as sub-contractor, to -111 has timelf ene moved onto bereins forthoo edt significant rejearings down to Mair out Tuoni bluew ad Jedy of bluew ston birding subject costs blends and on the

It is again contended by counsel for agreellant that the evidence of appelles shows that the lumber was furnished to ninfrom year to year upon a general open account; we do not no understand this evidence. The techisomy of appellar, which is not
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appears from the evidence that the construction of such building at
appears from the evidence that the construction of such building at

Duckner, that they were reasonably worth the prices charged, that the sub-contractor's notice was given within sixty days of the furnishing of the last materials, and that the Chancellor was well warranted in finding that appellee was entitled to a lien upon the said presides for the amount due for the material so furnished. The can see no reason why this case should be reversed and the decree of the Circuit Court is affirmed.

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Euglmor, the sub-contractor's notice was given within civit days of the cumpitum of the contractor's notice was given within civit days of the cult that the contract of the contract day for the case of the contract of the contract contract contract contracts contract contr

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I, A. C. MILLSPAUGH, Clerk of the Appellate	
State of Illinois, DO HEREBY CERTIFY, that the fore	
Appellate Court in the above entitled cause of record in	
	set my hand and affixed the seal of said Court
at Mt. Vernon, this	
A. D. 1914. A. C. J	Millspaugh
	Clerk of the Appellate Court.

OPINION

Fee \$

186 A 511



Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

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Hon. Harry Higbee. Presiding Justice. Hon. James C. McBride, Justice. Hon. Thos. M. Harris, Justice. A. C. MILLSPAUGH, Clerk.	186 I.A. 511 W. S. PAYNE, Sheriff.
And afterwards in Vacation, after said Marc of May, A. D. 1914, there was filed in the office of the OPINION in the words and figures following:	h term, to-wit: On the Aday ne Clerk of said Court at Mt. Vernon, Illinois, an
M Chissies	ERROR TQ APPEAL FROM
vs.	arcin COURT
October Term, 1913.	Daliu COUNTY
OY aro Cool Co	

TRIALJUDGE



October Term. A. D. 1913.

John McKissick,

Appellee,

vs.

Appeal from Saline County.

O'Gara Coal Company,

Appellant.

McBride, P.J.

Appellee recovered a judgment in the court below for \$650.00. Appellee was a man of the age of 29 years; had been working in this mine during the last four or five years engaged at different times in the capacity of timber and, all maing, loading coal, laying track, running machines and acting as helyer for machine runners. At the time he was injured be was warking in the capacity of helper to Charles Davison, a smoothe runner, in room No. 6, off the sixth north entry of the main west entry. During the day they land under-cut five or wik rooms and entries before going into room ho. 6. They began sutting on the left hand side of room No. 6, and has under-cut six boards and were working upon the seventh one when without any warning a large amount of coal, about twenty-five hundred pounds fell from the face of the room, caught appelled and injured him. It anpears from the evidence of the plaintiff that before beginning work in this room they examined the face of the coal and found no powder cracks, slips or negro-heads or anything of this titleracter. While appellee had worked around this mine for a causiderable length of time, it appears that he had not seen this mart of the mine before that day; that he was not accuminated with the rooms and place where he was at work and knew nothing whom the thickness of the pillars. It further appears from the evidence

Dodenber Twom, A. T. 1984.

John McKissick,

O'Gara Coal Compony,

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Welltide, T.F.

Appellee recovered a judgment in the court below for \$650.00. Appellee was a man of the age of Sy years; had been working in this mine during the last four or five years onthe street of the street and the senit distrible to beneg loading coal, isying track, success continue on course as selecer for modition rouners. At the the sea interest he essented ing in the expectly of below to Complet britain, a mention wenor, in room No. 6, off the sixth morth entry of the main west entry. During the day they had ender-out five or six rooms and entries before going into room les. 6. They began cutting on lim left bund side of room No. 6, and has under-cut sin bord and were working upon the ceventh one when without any variety a large amount of coal, about twenty-five hundred coundr fell from in face of the room, cought appelled and injured him. It engalantical everad fault Withinkala and to somehive and more stand buy of the room they examined the face of the cond and found no powder cracks, slips or negro-heads or anything of that claracter. Thile appelled had worked around this mine for a considtray still of time, it appears that he had not seen this part of the mine before that day; that he was not acquainted with the rooms and place where he was at verk and knew nothing about the thickness of the pillars. It further appears from the evidence

that the pillars of this room varied in thickness from five to ten feet and that they were wider at the entry than at the face of the coal where the men were at work. It also appears from he the testimony of miners engaged in this kind of work that to properly support a roof it was necessary to leave a pillar of about the width of twenty feet, and that when the millar and allowed to become too thin it would not properly support the roof and would bring on what is called a squeeze in a sine, and was liable to press the coal out from the face of the room.

There was a conflict of testimony as to whether or not a squeeze actually existed in this room at the time of the injury; some of the witnesses testifying to facts which were evidenced in a squeeze and others say that they did not see any such evidences.

The declaration charges a dangerous condition in this real.

"On account of the rib on each side of the read being so thin
as to allow the coal and pillars to press out from the rada of
the coal when the coal was underent. That the room opposite
the one in which the injury is alleged to have occurred had been
driven within fifty feet from the latter end. That by reason of
the coal having been worked out from adjacent rooms the numbers
of the roof was insufficient. That the plaintiff did not know
of the dangerous condition alleged and was in the exercise of
due care and caution for his own safety. That while at work in
the room named, on account of the conditions alleged, the plaintiff was injured by a quantity of coal falling on his from the
face of the coal he was under-cutting, injuring him, etc."

It is contended by counsel for appellant that "There was no effort whatever made to show that there was or had been any squeeze in the mine and the fact is that the conditions as do-scribed by the witnesses precluded the possibility of there having been a squeeze at that time, or that the coal was caused to fall

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actually existed in this room at the time of the injury; some
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of the witnesses tentifying to facts which were evidences of a

The declaration charges a dangerous condition in this room "On account of the rib on each side of the reem being so thin as to allow the coal and pillars to press out from the free of the coal when the coal was undercut. That the room opposite the one in which the injury is allaged to nave occurred had been write the part of the roof was insufficient. That the plaintiff iid not know of the dangerous condition alleged and was in the energies of the room named, on account of the conditions alleged, the plaintiff was injured by a quantity of coal falling on him from the face of the coal he was under-cutting, injuring this, etc."

It is contended by counsel for appellant that "fact was no effort whatever made to show that there was or had been only equeoge in the mine and the fact is that the conditions at actaoribed by the witnesses precluded the nossibility of there having seen a squeeze at that time, or that the coal was caused to fall

by any movement of the earth above, because it was shown to have been solid rock and with no break in it, so that from these facts counsel insist that the cause should have been taken from the jury at the close of plaintiff's evidence. He further insists that the injury was an accident and that the proximate cause of the injury has not been proven.

It is not necessary in this opinion to go into the details of the testimony of the several witnesses with reference to conditions existing, but it does appear from the testimuy of some of plaintiff's witnesses that the pillar between rooms five and six was of a thickness of about five or six feet, and it further appears from the evidence of expert witheres, iners engaged in this character of work, that when the pillars of a room are thinned to this width, that is not sufficient to support the heavy pressure from above and produces a suucone, which, as some of the witnesses say, results in bringing such a pressure upon the coal at the face of the room that, when undercut, it is liable to break off and fall out. The of the elitmesses also testified that he observed in this room, within three or four days of this injury, that a squeeze existed; that the pillars were enipping off because of the meany pressure upon them, and, while it is true that the mine exeminer tosti-Tied that he did not observe any of these conditions, he does not deny but that such conditions existed and the arme tray be said of other witnesses offered on behalf of the appliant. The appellee was not acquainted with the conditions surrounding this room; had not observed the width of the willars and his aftention ... not in any manner, so far as the evilence shows, were called to the fact that the pillars were thin but the appellant know or should have known of the thinness of the pillars and the effect that a reducing of them would have upon the roof of the room and the coal. If it is true, as contended by appelled and his witby any novement of the earth above, because it was alown to have been solid rock and with no break in it, so that from the there is that it is not the fury at the close of plaintiff's evidence." Its author lands that the land of the close of plaintiff's evidence." Its author lands the land of the lands.

I. I not necessary in this opinion to see into the details of the testimony of the several situesees with reference to to magnissed oil most manage soob it bud , maistine enclulance were proving galify at hell assessmile at Middising to make tive and wir was wi a thindness at about five ar aix love, ... THE THE BUTTLE TYPES IN SOMETHING WIT NOTE STRUCKED INCOME. organism of the claim of any or all the contract of the contract of - gue of theinfield to this width, thet is not pufficient to meport the heavy pressure from above and produces a squeeze, vinich. as good of the watnessee only results in brillian and to constant sure upon the cost at the face of the cost that, dec outcut, it is liable to break off and rall out. One of there witnesses also testified that he severe as the real section ture or four days of this injury, that a squeeze existed; that the billars were chipping off because of the Leavy presence when them, and, while it is the that the circ section that that that he did not observe any of these conditions, he does not dearly but the sunit count (tone each) but of the country but said of other witnesses offered on behalf of the appellant. The appellee was not acquainted with the conditions surrounding this property of the state of the state of the burner of the bear to be the bear beiles ones , sends sameles not se gat or , remon the of four Ken to the fact that the pillars were thin but the appullant knew or toeffe and the enaltic out to assemble to aword brooks that a reducing of their would heve unon the roof of the root and the sonly If it is true, as unprepared by expelles and his wilnesses, that the thinning of the pillers brought on a squeeze in this room which would have a tendency to produce pressure enough upon the face of the coal to push it down, or break it off when undercut, then the jury would be warranted in findings that appellant had been negligent in permitting such conditions to exist, and that such conditions caused the injury conclained of. This was purely a question of fact for the jury to determine.

It is next objected that expert witnesses were permitted to testify that the pillar left between the rooms was not sufficient to support the roof and were asked, without stating all of the conditions and surroundings, what thickness the pillar should have been required to support the roof. Box of these witnesses, if not all of them, had personal knowledge of the conditions surrounding the place and knowing such conditions could testify as to the effect wuthout putting hypothetical questions. They are at least shown to have such knowledge as would justify an opinion as to the required width of a siller to support the roof and the effect that a thinming of that willar would have upon the roof, and these were the principal questions propounded to the witnesses. If a witness is shown to . have personal knowledge of conditions it is wholly unnecessary to put such conditions as are within his personal knowledge in the question upon which an opinion is desired, and the mosition assumed by counsel that such questions tended to take away Iro m the jury the deter ining of the proximate cause of the lighty is not well taken. It has frequently been held by the Supreme KNEEK and Annellate Courts of this State, that as the military jurgs are not acquainted with the mining business that it is proper to introduce experts for the number of giving their oninion upon matters coming within the neculiar incoledge of iners. They are experienced in this character of work and to can due no

nesses, that the thinning of the pillars brought on a squeeze in the rough upon the face of the coal to bush it down, or break it chough upon the face of the coal to bush it down, or break it that when undercut, then the jury would be warrented in finding that appellant had been negligent in permitting such conditions that appellant had been negligent in permitting such conditions to exist, and that such conditions caused the injury complained to exist, and that such conditions of fact for the jury to determant. This was purely a question of fact for the jury to determants.

Bellinted exas sescentic fracto fail belowing than at if to tealtry that the miller left between the come was not earlicient to support the roof and were asked, without stating all Sailly and seaments same . spatimesage bue enolithoco should have been required to support the roof, loss of these vitnesses, if not all of them, had personal knowledge of the or it have gatword ban essin out anthousand anoid thous dould testify as to the effect wathout putting hymothetical questions. They are at least shown to have such knowledge as sulf justify an opinion as to the required width of a pillar to support the roof and the effect that a thinning of that mill-- would have upon the roof, and these were the principal .uonof mended to the witnesses, If a witness is allowed to green and distance I amilia to it is all forester eved to put such conditions as are within his percenal knowledge in the question upon which an opinion is desired, and the vorition negured by counsel that such questions tended to take away fro m the jury the determining of the proximate cause of the injury not well taken. It has frequently been held by the Supreme That and Appellate Courts of this State, that as the ordinary jurors are not acquainted with the mining business that it is -also that makely to second all not already applicable of respect ing upon entiers coming within the neguitar beardedge of closies. They are experienced in this character of work and we can dree no

reason why their evidence should not be received. In fact this contention is well sustained by the decision of our Supreme Court in the case of lenrietta Woal Co. ya. Cambell, Dil 111. 227, it is said, "Cortain questions were asked of expert mixxx miners as to whether in their judgment certain conditions as to the roadway rendered it safe or otherwise, and it is claimed this was error as the subject was one within the corner abservation of all men. We cannot say such was the case. The roadways and entries of a mine and their adaptability to the new intended are not matters of common knowledge, and re perceive no error in additting the character of evidence here objected to." See also Donk Bros. Coal & Coke Co. ys. Stroff, 200 111. 483. Jacobs vs. Madison Coal Corporation - 165 App., 444. We do not believe that the court committed any error in the admission of this evidence.

Counsel for appellant contends that the whole series of appellee's instructions, even though they are of a present correctly the propositions of law that are applicable to the facts in this case. No reasons have been pointed out as to why the propositions of law laid down by the court are not correct and we are unable to say that any error exists in this report.

It is complained that the jury failed to follow defendant's sixth instruction, and re presume this was because the jury did not agree with the contention of appellant that appellee had contributed to the injury.

Complaint is also made of the modification of appellant's fifteenth and sixteenth instructions. The instructions, especially the fifteenth, as presented, was not correct as it should have limited the falling of the coal alone to its being under-out with a machine, which it did not do; and the same principle may

reason why their evidence should not be received. In fact this contention is well sustained by the decision of our Surrege Court in the case of henrictia Cost Co. vs. Composit, 211 111. 227, it is said, "Certain questions were saked of empert mixm miners as to whether in their judgment certain conditions as to the readway rendered it safe or otherwise, and it is elaired this was error as the subject was one within the common abnervaation of all men. We cannot say such was the case. The roadways and entries of a mine and their adoutability to the use intended are not matters of common knowledge, and we merceive no error in admitting the character of evidence here objected to. " See also Donk Bros. Coal a Coke Co. vs. Stroff, 200 111., Jacobs vs. Fadiren Corl Corporation - 165 App. 444. on not believe that the court committed any error in the edulaerateless for puller to make of pulls. lon of this evidence.

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been error in the effort of the court to limit these instructions in their effect, it could not work a reversal.

The defendant's refused instructions numbers one and two were properly refused. They ignored entirely the question contended for by plaintiff, of the injury having been brought about by the acts of the defendant. The instruction should have been so framed as not to have excused the defendant because of any latent defects that may have been produced by its negligent acts. Besides, we think the jury were well and fully instructed upon what constituted negligence of the defendant and due care of the plaintiff.

The real question at issue in this case was one of fact, and while the evidence was somewhat conflicting, we cannot say that the verdict of the jury was manifestly against the weight of the evidence, and are of the opinion that the judgment should be affirmed.

JUDGHART AFFIRMED.

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(not to be reported in full.)

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The real question at issue in this case was one of fret, and while the values of issue of white the this realist of the jury of the collection of the satisfication of the satisfication of the satisfication.

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May,
A. D. 1914.

Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

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P	ro	2.	0	n	t	•

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

V	V.	S.	PA	YNE,	Sher	iff.
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A. C. MILLEST AUGII, CIETA.	V. S. IIIII Sheriji.
And afterwards in Vacation, after said Marco of May, A. D. 1914, there was filed in the office of th OPINION in the words and figures following:	and the second s
	ERROR TO APPEAL FROM
Hallo	186 I.A. 512
vs.	Court
October Term, 1913.	
	Tarrish of COUNTY
Wasson Cooles	
TRIAL	JUDGF



October Term, A. D. 1913.

Martin Hollo,

Appellee,

VS.

Wasson Coal Company,

Appellant.

Appeal from the City Court of Harrisburg.

1861A.512

McBride, P.J.

Appellee recovered a judgment against appellant in the city court of Marrisburg, Illinois, for two thousand dollars, from which the appellant prosecutes this appeal.

The appellee was helper to one Mike Hando, who was engaged in operating a machine for under-cutting the coal in appellant's mine located in Saline County. They were engaged in work in under-cutting a "break through" from room six to room four, off of the fourth east entry off of the main south entry. This "break through" was started at the distance of about twenty-five feet from the face of the coal in room No. 6, and was of the width of about twenty-four feet and had been driven in the distance off about sixteen feet towards room No. 4. Appellee and the machine runner had commenced work upon this "break through" about ten days prior to the injury, and had made at least three rune or EE cuts and after the making of each cut they would move out the machine, the coal would be shot down and loaded out and then they would return and make another cut. On February 14, 1911, they were engaged at cutting the coal in this "break through" and after having worked therein for some time the roof of the room fell in and injured appellee.

It appears from the evidence that appellee and his buddy had examined the roof at and near the face of the "break through"

Terra No. 51.

Agenda No. 33.

Cetober Term, A. D. 1913.

Martin Hollo,

Appelles,

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Wasson Conl Commun.

Appellance

Acpeal from the City Court of Marrisourg.

TRAILA. 512

McBride, F.J.

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It appears from the evidence that appeales and his buddy

at the time they commenced work upon this day, and that for the distance of four or five feet the roof was apparently safe but back the distance of ten to twenty feet the roof was apparently loose, drunmy and unsafe. At the time of the injury the appellee was standing some five or six feet back from the face of the coal and his injury was caused by the falling in of the roof at and near where it had appeared to be loose. It appears that it was the custom in that mine, when occasion required, for the machine runners to get props. It is claimed by appelled that the roof of this place had been loose and drummy for several days; that they had ordered props of the length of five feet, which they claim was the proper length, to prop the roof; that appellant had failed to furnish these props. That the mine examiner of appellant had failed to observe the condition of this roof, and mark it as required by statute. Upon the other hand, it is claimed by appellant that when the mine examiner went into the "break through" on the morning of the day of the injury, that the place was safe, and that there were no dangerous canditions which could have been discovered and that no demand for props was ever made and that the injury was caused directly and proximately from the change of conditions accruing after appellant's mine examiner had been in the place, and that the appellee had participated in producing the conditions which led to his injury.

It appears from the evidence that there were two props in the room which were of the length of about six feet but could not be used for the propping of the roof. That the thickness of the vein was about five feet and appellee claims that an attempt had been made to use the props in the room but owing to their length they were not able to do so, and props of the length of five feet had been demanded. Appellant claims that they measured the distance from the roof to the bottom of the place and that it was

of the time that commanned work upon this day, and that for the distance of four or five feet the root was apperently este but back the distance of ten to tenty feet one root was opporting loose, drumny and unsafe. At the time of the injury the appelsaid to soul out mort word test was no svil smoa gathasts asw sol coal and his injury was caused by the falling in of the roof at int near where it had appeared to be loose. It appears that it was the custom in that mine, when occasion required, for the machine runners to set props. It is claimed by applice that the roof of this place had been loose and drummy for several days; that they had ordered props of the length of five feet, which they claim was the proper length, to prop the root; that appellant had failed to furnish these props. That the mine examiner of appellant had failed to observe the condition of this rout, and mark it as required by statuta. Upon the other hard, it is claimed by appellant that when the mine on miner went into the "dream sirough" on the morning of the day of the injury, that the place was safe, and that there were nu dangerous conditions their the saw says and broath an ind has betweenth and send blues made and that the injury was caused directly an granaling Trom the shangs of conditions anothis griver orpes to agamic od; world animer had been in the place, and that the appelles had particirated in producing the conditions which led to his injury.

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about five feet six inches but appellee contends that this is a explained by the measurement having been made after the fall of the slate from the roof.

The evidence discloses that the bones between the knee and the ankle were broken and that appelled suffered a very serious injury and has been unable to perform any work from that day to the present, and that he is permanently injured.

The appellant in his argument contends that the cour' erred in refusing to direct a verdict for defendant and in not granting its motion for a new trial. In the argument made by counsel for appellant it is not contended that the evidence of appellee is not sufficient to warrant a verdict, if it were of a character to be relied upon, but his claim is that the evidence of appellee is unreliable, contradictory and inconsistent with other statements made by his witnesses and should not be allowed by this court to prevail over the evidence of the witnesser of appellant. No complaint is made of any error committed by the court upon the trial, except a general chiticism upon come of the instructions, which will be hereafter considered. The declaration charged that the defendant wilfully failed to furnish props, and cross bars when demanded. That the defendant did not em loy a licensed mine examiner and that the place where the injury occurred was dangerous and was not marked. That the defendant permitted appellee to enter his place to work while a dangerous condition existed therein. The evidence of the witnesses of amellee in this case, if believed by the jury, wassufficient to verrent to the jury in returning a verdict in his behalf, which is practically conceded by counsel for appellant but it is insisted that on account of the contradictory and inconsistent character of the evidence the jury was not warranted in believing it.

The first criticism of appellant is, that the testimony of the witnessem Gabriel Solomon, is contradicted by his written

shout five fact air inches but appelles contends that the less explained by the sessioner lieving been made effer the fell of the slate from the roof.

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The livet criticism of appellant is, that the terline of the witnesses debrief Enlance, is controlicted by his writing

statement made to appellant shortly after the accident, wherein he states he did not see the accident; no particular statement made by the witness Solomon while upon the stand is pointed out as contradictory of this one. We have read his evidence and do not understand him to testify that he saw the accident. Counsel has failed to point out any other contradictory statement of this vitness but proceeds to criticise the statement of them. Tote, wherein he quotes the witness as saying "I renember what the condition of the roof was because the boys told me." The court, on request, would have stricken out this hearsay testiment and counsel having failed to ask that it be stricked cannot complain for the first time in this court that it was error. The same may be said of the criticish made of the sitness fillerson.

It is also claimed by counsel for appellant that the demand for props, testified to by some of the witnesses, was made at the bar room and argues that a place of this character used for drinking was not the proper place for the transaction of such business. Counsel for appellee insist that the tar room referred to by the witnesses was not a place for drinking but it was merely a room in which bars of iron used in the mine were kept. We can see no reason why there should exist in the minds of counsel any uncertainty as to the place intended by the witnesses. It looks as if some one was trying to deceive and mislead this court in this matter. Such deception is wholly uncalled for and inexcusable. Whether the place was a salcon or place where bars of iron were kept, it appears from the evidence of plaintiff's witnesses that the promise was made to deliver the props, and if so, the place of demand would not be so important.

The facts with reference to the Company having discharged its duty in examining the place, ascertaining its condition and the cause of the injury were all matters proper to be determined by thejury. Nothing has been pointed out, other than the dis-

mistale, the appellant shortly after the secioent, wherein he states he did not see the accident; no particular statement Sue berning at oners wir nogo ofthe member seasily sit of above as contradictory of this one. We have read his evidence and da not understand him to testify that he saw the accident. Courssel has failed to point out any other contradictory statement of this witness but proceeds to oriticise the statement of Alex Tote, wherein he quotes the witness as reging "I remember whet the condition of the roof was because the toys told me." The court, on request; would have stricken out this heareay teetimony and counsel having failed to sek that it be stricken cannot complain for the first time in this court that it was error. The same may be said of the criticism made of the witness Killernan. -ob sait tast the alege rollier bounds the the demand for props, testified to by some of the witnesses, was made at the bar room and argues that a place of this character used for drinking was not the proper place for the transaction of such business. Counsel for appelled insist that the tar room referred to by the witnesses was not a close for drinking but it was merely a room in which bars of iron used in the mine were kept. We can see no reason why there should exist in the minds of counsel any uncertainty as to the place intended by the witmesses. It looks as if some one was trying to deceive and rieleed this court in this matter. Such deception is wholly uncalled for and inexcueable. Whether the place was a calcon or place where bars of iron were kept, it appears from the svidence to deliver witnesses that the proxise was rade to deliver the props, and if so, the place of demand would not be se im-

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crepancies and contradictions above referred to by the counsel, showing why this verdict is against the weight of the evidence, and from a reading of the testimony we are not able to say that the verdict of the jury is manifestly against the weight of the evidence, and we can see no reason for disturbing its finding.

The criticism of appellee's first five instructions, that they are misleading, in this, that they do "not say that the defendant has been guilty of a wilful violation of the statute. it comes so nearly doing so that the jury are misled," this, as well as the specific criticism of the fifth instruction that int its phraseology in stating that the contributory negligence is no defense to an action arising from a wilful violation of a statute, are well taken. The claims made by counsel in his ovening statement, that no demand had been made for props, and that no dangerous condition existed at the time the mine exeminer examined the roof, were not insisted upon in the argument of the case but we have examined the testimony upon these questions and we find that it is conflicting. If the testi ony of appellee's witnesses is to be believed, then a demand was made for prope of the length of five feet, and were not furnished. The dangerous condition existing in the roofof this "break through" should have been observed by the mine examiner and marked as dangerous. and the appellee should not have been permitted to enter this place to work until the place had been made safe. Thile it is true that appellant's witnesses denied any demand ever having been made for props, denied that the dangerous condition had existed at the place where appellee was engaged at work, prior to the day of the injury, and that any necessity existed for marking the roof as dangerous, these were, however, questions upon which the testimony was conflicting and the jury would have been warranted in finding either way upon any of these propositions. Under the repeated decisions of this and the Supreme Court, where

erepancies and contradictions above referred to by the counsel, showing why this verdict is against the weight of the evidence, and from a reading of the testimony we are not able to say that the verdict of the jury is manifestly against the weight of the evidence, and we can see no reason for disturbing its finding.

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the evidence is so conflicting that a jury would be warranted in adopting the testimony off either of the parties, that under such circumstances the finding of the jury is conclusive, and the reviewing court would have no right to disturb its verdict.

We do not see that any reversible error has been committed in the trial of this cause and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reportedin full.)

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	GH, Clerk of the Appellate Court, within and for the Fourth District of the
	BY CERTIFY, that the foregoing is a true copy of the OPINION of the said we entitled cause of record in my office.
	MONY WHEREOF, I have set my hand and affixed the seal of said Court
at	Mt. Vernon, this day of May,
A.	. D. 1914.
	Clerk of the Appellate Court.
	otom of the Appendic Court.

OPINION

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186 A514

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

1340

A. C. MILLSPAUGH, Clerk.	W. S. PAYNE, Sheriff.
And afterwards in Vacation, after said March of May, A. D. 1914, there was filed in the office of th OPINION in the words and figures following:	n term, to-wit: On the Aday e Clerk of said Court at Mt. Vernon, Illinois, an
Duncon Hol Commissioner + & No. 56	ERROR TO APPEAL FROM 186 I.A. 514 Circuit court
October Term, 1913.	Crowford COUNTY
Fitch, whole Commissioners 184	

TRIAL JUDGE



October Term, A. D. 1913.

Lowe C. Duncan, et al., Commissioners of Highways of the town of Montgomery.

VS.

Appellees,

Appeal from the Circuit Court of Crawford County.

Frank Fitch, et al., Drainage Commissioners of the Birds Drainage District, Appellants.)

McBride, F.J.

186 I.A. 514

The appellees presented their petition to the Circuit Court of Crawford County for a writ of mendamus to commel the appellants to construct a bridge over a ditch that had been dug by the appellants across the highway in the drainage district then controlled by appellants. It appears from the petition that the ditch dug by the appellants was on the right of way of the C. V. & C. R. R. Co., and was of the width of thirty feet and of the depth of ten feet and was not cut in a natural water course or drain, and that by reason of the cutting of said ditch the said highway was rendered useless to the public and impassable to travel and that it will be necessary to construct a bridge across said ditch for public travel and that said public highway is one of the main travelledroads in the twon of Wontgomery and that it would cost about one thousand dollars to construct such That Trequent requests have been made upon the drainage commissioners to construct a sufficient bridge over send ditch and to restore the highway so it will be convenient for the use of the public travel and that said drainage commissioners have refused to erect a bridge and to put said highway in a good con-To this petition the appellants filed two dition for travel. pleas. The first says that the commissioners conderned the right of way over and across the lands of the C. V. & C. R. R. Company,

Term No. 56.

Agenda No. 18.

October Term, A. D. 1913.

Lowe C. Duncan, et al., Commissioners of Highways of the town of Mentgomery.

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Appellees,

Appeal from the Circuit Court of

Frank Fitch, et al., Drainage Commissioners of the Eirde Drainage Diatrict.

McBride, f. J.

1861.4.514

The appelleds presented their petition to the Circuit uni famme of summbasm to firm a rel vinuo brolwer to fruo gub hood bad fand dotib a revo egbird a four feno of afallegas by the appellants across the highway in the drainage district then controlled by appellants. It appears from the petition that the ditch dug by the appellants was on the right of way of the C. V. & C. R. R. Co., and was of the width of thirty feet and of the depth of ten feet and was not out in a natural water course or drain, and that by reason of the cutting of said ditch the said his sildun add of seeless bereder saw washic and impassesble to travel and that it will be necessary to construct a bridge across said ditch for public travel and that said public bighway is one of the mein travelledronds in the twen of to me and draw drawing and equiling homesculd may double from bloom \$1 food Thatfrequent requests have been made upon the drainage commissioners to construct a sufficient bridge over said ditch and to restore the highway so it will be convenient for the use over cronotestance end that each draining consistence and to refused to erect a bridge and to put said highway in a good con-To this petition the appellants filed try dition for travel. The first says that the commissioners condemnéd the right of way over and across the lands of the '. v. a C. R. a. Company,

through Bections 17 and 20, in the town of Montgomery, over and across the highway where it crosses said railroad right of war and that they caused to be constructed their ditch in said drainage district over and along the right of way as conderned against said railroad company, and that by virtue of said judgment and condemnation they had a right to dig said ditch on the payment of the sum found to be due the Hailroad Company for the right of way and that said Railroad Company is required to build and maintain the necessary crossings for highways over and across their right of way, which defendants were ready to verify. this plea a decurrer was interposed, and, as we think, proverly sustained by the court. The drainage commissioners having dug a ditch across the highway, not in a water course, are required under the law to build a bridge sufficient for the convenience of public travel over said ditch and to restore the highway. Commissioners of Pighways of the town of Dement va. Com. of lake Fork Special Drainage Dist., 246 Ill., 388. People, etc., vs. Fenton & Thomson R. R. Co., 252 Ill., 372. Even though the appellants had condemned the right of way as to the Railroad Company, and had paid to such Railroad Company the danger essessed, this would not excuse the appellants from the performance of the duties required of the drainage district, nor does it appear from this plea that the bridge in question was across its railroad or was of the character which the law required the Railroad Company to build.

The second plea of appellants avers an agreement between the appellees and appellants whereby they agreed upon an assessment of benefits in the sum of fifty dollars, and that in addition thereto the appellees were to construct and maintain the bridge over and across the ditch in question. The plea then avers that in pursuance of said agreement the appellees constructed and are now maintaining a bridge across said ditch where the said high-

through Sections 17 and 20, in the town of Montgomery, over to Julit bearflat bisa sessors it stow which in each section bas wag and that they caused to be constructed their ditch in said drainage district over and along the right of way as condemned arainst said railroad commany, and that by virtue of said judgment and condemnation they had a right to dig said ditch on the payment of the sum found to be due the hailroad Company for the right of way and that said sailroad Commany is required to build and maintain the necessary crossings for highways over and across their right of way, which defendents were ready to verify. this plea a demurrer was interposed, and, as we think, promerly. austained by the court. The drainage commissioners having dus a ditch across the highway, not in a water course, ove required money the law to build a bridge sufficient for the converience of public travel over said ditch and to restore the highway. Commissioners of Highways of the town of Tement vs. Com. of lake Fork Special Drainage Miet., 746 111., 388. Paople, etc., vs. Fenton & Thomson R. R. Co., 257 Ill., 372. Even though the erpollants had condemned the right of way as to the Reilrord Conpany, and had paid to such hailroad Company the damages orsessed, this would not excuse the appellants from the performance of the duties required of the drainage district, nor does it soresr from this plea that the bridge in question was across its railroad or was of the character which the law required the Failtead Company to build.

second plea of appellants avers an agreement between the appellees and appellants whereby they agreed upon an encessent of benefite in the sum of fifty dollars, and that is addition thereto the appellees were to construct and maintain the bridge over and scrose the ditch in question. The plea then avers that in pursuance of said agreement the appellees constructed and are now maintaining a bridge across said ditch where the said high-

way crosses the same, which bridge furnishes ample facilities and conveniences for the public travel. To this plea appelless also filed a demurrer which was sustained by the court.

We agree with the contention of counsel for appelless that as this duty devolved by law upon the drainage district to construct the bridge that the commissioners of highways would have no right to make a contract assuming this burden, and would have no right to levy a tax to build such a bridge. People etc. vs. Fenton and Thomson A. R. Co., (Supra). If this were all the plea contained we would have no difficulty in finding that the court was justified in sustaining the demurrer to the plan, but the plea further says that the appelless and constructed and were now maintaining a bridge across said ditch where the said highway crosses the same, "which bridge furnishes ample facilities and conveniences for the public travel. If it is true that there exists across and over said ditch a bridge which furnishes ample facilities and conveniences for the public travel, then why the necessity of the court comelling by mendamus the appellants or any one else to expend a large amount of money in building a bridge that is unnecessary. A writ of mandamus is not granted except where a clear right is shown and rests in sound judicial discretion, and the court, in the exercise of such discretion, would not require a drainage district to expend one thousand dollars in the building of a bridge when no necessity existed therefor. If a bridge sufficient for the public travel had been built, and was then in existence, how can it be said that a clear right to have the relief prayed for would exist, and this is necessary before the writ would be granted. People, etc., vs. The Mayor, etc., 51 Ill., 17. The fact that the bridge may have been built and maintained by the appelles, as averred in the plea, could make no difference even though the appellees were not bound to build it. The principal and controlling question is, way aroneme the nume, which bridge forgress mail from the conveniences for the public travel. To this plea appellees

We agree with the contention of counsel for appellers that as this duty devolved by law upon the drainage district to comstruct the bridge that the conjusted of income would ask discount to make a contract assuming this burden, and would nave so right to lavy a tax to build such a bridge. Feels, etc. va. Penton and Thomson M. R. Co., (Supra). If this work all the set fait mithail in willing the we have the there in the court was justified in sustaining the demurrer to the plea, but the plea further says that the appellace had constructed and were now aninining a bridge agrees anid lives where the said Libray crosses the same, "which bridge furnishes ample facilities and empyaniences for the public troods. It is is to true doing applied a dotth bise revo bas esous etrice eredt tall Terr pilder and ref someinsynoo bas saidilinel signs sadalarul el, then why the necessity of the court commelling by menduane years to Januare surel a backs of sale one was to similized add to bullding a bridge but to processory a such of madesur to or other has seen at digit would a stand france believes for "our le estrate ad the court, in the exercise of the one bnerks of feither a draining a draining to bluew, wolfstreib through of cale against a to getting out at equito how are not asserted existed therefor. If a bridge sufficient for the public trotol had been built, and was then in emistence, how can it we emid bis , sains bises of aver feller old evad of fait reeds a fait this is necessary before the writ would be granted. People, etc., vs. The Mayor, etc., 51 111., 17. The fact that the bridge may have been built and maintained by the aspelless, as averred in the pleas could make no difference even though the mapellees norm at notinent to build it. The principal and controlling quention is

did the appellants lig a ditch across this highway and is there such a bridge there as to furnish apple facilities and conveniences for public travel? If there is not, then a bridge should be constructed and if there is then no necessity exists for such a bridge.

We think that the Court should have required an issue to be formed upon this question and then determine by trial as to whether or not such a bridge in fact exists.

We are of opinion that the court erred in sustaining the demurrer to the second plea, for reasons above stated, and that the judgment of the Circuit Court should be reversed and remanded with directions to overrule the decurrer to the plea and require an issue to be formed upon the questions suggested as presented by such plea.

REVERSED AND REPANDED WITH DIRECTIONS.

(Not to be reported in full.)

cid the apportants sign dites arrow this history and is play such a bridge there as to furnish ample facilities and conventences for public truvaly if there is not, then bridge or not a seconstructed and if there is then no accountly extension such a bridge.

to faint that the Court should may remaine on londe to form to the form the fact of the court of the whether or not such a uriage in inot exists.

We are of epinion that the court erred in suctaining the desurrer to the second plea, for reasons above stated, and that the judgment of the Circuit Court should be reversed and remided with directions to overrule the demurrer to the plea and remided to the to be comed upon the questions.

MEVERNBED FAD RESTREES

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of May, A. D. 1914.
Clerk of the Appellate Court.

OPINION

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Fee \$

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, in ... e being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:	
Hon, Harry Highee. Presiding Justice.	
Hon. James C. McBride, Justice.	;
Hon. Thos. M. Harris, Justice.	
A. C. MILLSPAUGH, Clerk.	W. S. PAYNE, Sheriff.
And afterwards in Vacation, after said March	term, to-wit: On the
of May, A. D. 1914, there was filed in the office of the	
OPINION in the words and figures following:	Clerk of Sala Court at Int. Vertion, Inthois, and
OF INTOIN IN the words and figures following.	1
	ERROR TO
	ERROR TO
\cap	APPEAL FROM
Va a N A A N	
XCE PCCO . C	
	FOOT
	186 I.A. 531
VS.	()
A.S.	COURT
No	
October Term, 1913.	
October Term, 1913.	
	Tagelle COUNTY

TRIALJUDGE

Hon MRose



October Term, A. D. 1913.

Frank Jackson,)
Appellee,) Appeal from Circuit Court
٧.) of Fayette County.
Toledo, St. Louis & Western Railroad C-ompany,)
Appellant.	1861.A. 531

Opinion by Harris, J.

The facts in this case so far as material to issue before this Court appear to be as follows:

There was on the 18th day of May, 1911, pending in the circuit court of Payette County the case of appelled against appellant in which said suit petitioner was attorney for appellee, and on the following day J. W. Guinn as such attorney for appellee, delivered to C. E. Pare, Attorney for appellee, delivered to C. E. Pare, Attorney for appellee, a notice of his employment by appellee and the terms of employment, signed F. E. Guinn.

The appellee's claim in so far as he was personally interested in and by said suit was compremised and settled between the parties on the 16th day of December, 1911, for \$125.00.

That at the "ebruary Term, 1913, A meeting and mendaent to petition were filed in said cause to which the enswer of appealant was filed.

That at the May Term a hearing was had upon a petition,

and amendments, no enswer and otion of amelles. The Court

sust ined motion and prayer of petition and antered judgment

accordingly for the sum of \$62.50 Attorney's fees.

The contention of appellant is that the notice is insufficient in form and substance, and that there was no proper service of said notice upon appellant.

The statute of this state (laws 1909 p.97) provide: "Buch

October Yerm, A. D. 1918.

Appellee,)

Appellee,)

Appellee (appelle County.)

Toledo, St. Touis & Western)

Religond G-0 on, Appellent.)

Opinion by Larris, J.

The facts in this case so far as material to issue before this Court appear to be as follows:

There was on the 18th day of lay, 1911, pending in the excise to court of Reyette County the case of appellee against appellant in which said suit petitioner was attorney for appellee, and on the following day F. E. Guinn as such attorney for appellee, delivered to C. E. Tope, Attorney for appellant, a motice of his employment by appellee and the terms of employment, signed F. E. Guinn.

The appeller's claim in so far as he was personally interested in and by said suit was compromised and settled between the parties on the loth day of December, 1911, for

That at the chruary Term, 1913, passessing and chendment to petition were filed in said cause to which the enswer of appeblant was filed.

That at the hay Term a meaning was had upon a potition, was amendments, to answer and motion of accelles. He court sustained motion and prayer of petition and entered judgment accordingly for the sum of 1822 to Attermey's fees.

The contention of appellant is that the notice is instrficient in form and substance, and that there was no proper service of said notice upon appellant.

The statute of this state (Laws 1909 p.97) provide: "Jum:

attorneys shall serve notice in writing upon the partys against whom their clients have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suit, etc. This statute upon the question here involved has been construed by our Supreme Court in case of Haj vs. American Bottle Co., 261 Ill., 362. The Court say: "The statute creating attorney's kich creates a liability no-known before the passage of the act, and where that is the case the statute must be strictly followed. The general sale in regard to service of process or legal notice is, that it must be served personally on the party or the individual in question, unless some other mode is specially provided for that purpose by statute or has been otherwise established by long and recognized practice to the contraty."

If personal service is required, the statute says, upon the party against whom his client may have the suit or almin would certainly mean that party against whom summons would issue, and notice personally served on said party should inlow the law as to service of process as to the proper individual where the party is a corporation.

There being no service of notice in this case the notice offered in evidence for want of showing a proper service was incompetent and it is not necessary to discuss the other errors assigned. Without the service of notice as provided by the the claim of appellee having been before that time compresses and settled, the petitioner could not recover.

The judgment of the Circuit Court is therefore reversed with following finding of fact to be entered as a part of the judgment:

That no proper notice was served by petitioner upon appellant prior to filing of his petition.

Reversed.

estioneys shall serve notice in writing upon the narting equinst whom their clients have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suit, etc. This statute meen the question here involved has been construct by out Supreme Court in case of Haj vs. American Bottle Co., 261 131., 267. The Court says known before the passage of the act, and where that in the case the statute must be strictly followed. The general rule in regard to service of process or legal notice is, that it must be served personally on the party or the individual in question, unless some other mode is specially provided for that puriose by statute or has been otherwise established by

the party against whom his client may have the suit or claim would certainly mean that party against whom summons would leave, and petice percently served on with the law as to earwice of process as to the prover individual where the party is a corporation.

offered in evidence for want of showing a proper service was incompetent -nd it is not necessary to discuss the other errors assigned. Thiout the nervice of notice as provided by law, the claim of appelles having been before that time compromised and settled, the petitioner could not recover.

The judgment of the Circuit Court is therefore reversed with fellowing finding of fact to be entered as a part of the judgment:

That no proper notice was served by petitioner upon applant prior to filling of his netition.

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May,
A. D. 1914. O Millsbough

Clerk of the Appellate Court.

OPINION

186 A 532

995

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

ing the 24th day of March, in the year of our Lord, one	tnousana nine nunarea ona fourteen.
Present:	
Hon. Harry Higbee. Presiding Justice.	
Hon. James C. McBride, Justice.	
Hon. Thos. M. Harris, Justice.	IN C DAVNE Chariff
A. C. MILLSPAUGH, Clerk.	W. S. PAYNE, Sheriff.
And afterwards in Vacation, after said March te	erm, to-wit: On the day
of May, A. D. 1914, there was filed in the office of the C	Tlerk of said Court at Mt. Vernon, Illinois, an
OPINION in the words and figures following:	j ,
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	ACOT & POI
	186 I.A. 53
218	ERROR TO
Harris Town 10100	APPEAL FROM
Manual I I man	
VS.	COURT
No. 20	/
X10.	
October Term, 1913.	
	11(1)
	Wobosh COUNTY
Direction .	

TRIAL JUDGE

Hon



October Term, A. D. 1913.

Harding & Miller, Corporation)

Appellee,

V.

C. A. Sharpe,

A ppellant.

Appeal from the Circuit Court of Wabash County.

14611.532

Opinion by Harris, J.

Appellee brought suit in replevin to recover from ampellant the pessession of certain piano stool and scarf and filed a declaration consisting of two counts charging an unlawful taking and unjustly detaining the same to which appellant filed the pleas of non detinuet, not cepit, and property in appellant upon the filing of replications is sue was joined a trial by jury a verdict and judgment finding the right of proverty to be in appellee.

The undisputed facts in this case as they appear from
the record are: That on the third day of August, 1911, appellee, through their agent sold and delivered to Mrs. Laura 7.
Willer and Harry S. Willer the property in question for the
sum of \$350.00 and received from them their obligation to pay
for same by installments which were never paid. That on the
fourth day of December, 1911, appellant made a loan of \$97.35
to said Marry S. Miller and Laura L. Miller and took from them
a chattel mortgage upon the property inquestion, which said
mortgage was filed for record on the 25th day of April, 1912.
That after different visits and attempts by agent of appellee
to obtain payment or security from the Villers for the property
in question he took possession under the obligation of purchase
from the Villers of the property on 23rd day of April, 1912, and
delivered to them their obligation.

October Term, A. D. 1913.

v.v

Appeal from the Circuit Court of Websek Courts.

1861 / 592

Opinion by Farris, J.

Appellee brought suit in replevin to recover from spectlant the possession of certain pians stool and scrift and filed
a declaration consisting of two counts charging an unlawful
taking and unjustly detaining the same to which appellant filed
the pleas of non detinuct, now cepit, and property in appellant upon the filing of replications is we was joined a tried
by jury a verdict and judgment finding the right of property/
in appellee.

The undisputed facts in this case as they appear from the record are: That on the third day of August, 1911, appeallee, through their agent sold and delivered to Fre, Laura 1.

Willer and Barry 5. Willer the property in question for the sum of \$550.00 and received from them their obligation to may for same by installments which were never yaid. That on the fourth day of December, 1911, accellent made a loan of 197.35 to said Marry 5. Miller and Laura L. Miller and took from them mortgage was filed for record on the 25th day of April, 1912.

That after different visits and attempts by egent of special to obtain payment or security from the Millers for the property in question be took possession under the obligation of purchams from the Willers of the property on 25rd day of April, 1812, and delivered to them their obligation.

At the time of beginning this suit it appears the possession of the property was in appellant and was replevied from him.

The contentions of appellant as to the law of chattel mortgages when valid or void do not apply to this case. It may be conceded that on the 25th day of April, 1812, when appelled took possession of the property in question neither appellant not appelled had under the law a valid lien or nortgage as against other lien holders who had protected their liens under the law. However, both instruments although void under the law as to bona fide lien helders were good and linding as between the parties thereto.

This being the condition of this record on the 25th day of April, 1912, and appellee having a right, as between themselves and the lillers, to take this property and on that day having taken it into their possession, the appellant was not ina position to complain.

The assignment that Mrs. Miller claims to have made of an interest in a relative's estate and which she says was accepted by appellant and appellant says was conditionally accepted was at the time of taking property returned to her, accepted by her and she has since received the money due her from said estate.

There was no error in the trial or in judgment entered in this case.

AFFIRWED.

868.803.803.808.

(Not to be reported in full.)

At the time of beginning this suit it appears the pessession of the property was in appellant and was replevied from time.

The contentions of appellant as to the law of chattel mortgages when valid or void do not apply to this case. It may be conceded that on the 25th day of April, 1915, when are ellestock possession of the property in question neither appellant not appellee had under the law a valid lien or mortgage as against other lien holders who had protected their liens under the law. However, both instruments athough void under the law as to bone fide lien helders were good and linding as between the parties thereto.

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There was no error in the trial or in judgment untered

AND STREET, ST

APPIENS.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this / A day of May,
A. D. 1914. A. D. 1914. Cterk of the Appellate Court.
Cterk of the Appellate Court.

OPINION

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Fee \$.

15t A 533

996)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Verrion, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Pres	sent:
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Hon. Harry Higbee. Presiding Justice. Hon. James C. McBride, Justice. Hon. Thos. M. Harris, Justice. A. C. MILLSPAUGH, Clerk.	W. S. PA YNE, Sheriff.
And afterwards in Vacation, after said March of May, A. D. 1914, there was filed in the office of the OPINION in the words and figures following:	
Halbut alm Woonon, Deet	ERROR TO APPEAL FROM
No. 2 1 vs.	Court
October Term, 1913. Tradus Live Uter Cychy	C. Sfauis COUNTY

TRIALJUDGE

Hon PAFlannigan



October Term. 1913.

William U. Halbert, Administrator of the Estate of Frank Loonan, deceased, Appellee,

Append from the City Court of Rast St.Louis.

Trader's Live Stock Exchange,

Appellant.

186 I.A. 533

Cpinion by Harris, J.

This case was before this Court at the March Term, 1912, reported in Volume 173 App., p. 229.

A statement of the allegations of the bill and the sufficiency of the allegations were before this Court at that time and appear in the opinion. The further proceedings in said cause were upon the filing of the remanding order in the Court below at the Tovember Term, 1912, former decree was vacated, and demurrer to bill overruled. Appellant answering bill admits a death of Frank Loonan. Appellee's appointment and qualification as administrator. The membership and good standing of Trank Loonan at the time of his death in appellant's exchange. The issuing of the certificate of membership to Frank Loonan. The bylaws of appellant exchange, and that they were in force and effect at the time of the death of Frank Loonan. That appellant obtained possession of said certificate after the death of said Frank Loonan and caused the same to be cancelled according to the by-laws governing said association.

The answer denies that Frank Woonan ever paid into the treasury of such association the sum of 500.00. Denies Frank Woonan was at the time of his death the owner and in possession of the certificate. Denies that all fines had been hald. Denies that any forfeiture or assignment thereof had been made; denies that appelles became entitled to possession of the outificants

October Verm, 1913.

William U. Ralbert, Administrator of the Datate of Frank Moonen; deceased, Appellee,

vs.

Trader's Live Stock Exchange,

James I Tayon

Appeal from the City Court of East . t.Louis.

186 I.A. 533

Column of Carriers.

This case was before this Court at the Larch Term, 1919, reported in Volume 173 App., p. 289.

A statement of the allegations of the bill and the sufficiency of the allegations were before this fourt at that the and appear in the opinion. The further proceedings in said cause were upon the filing of the remending order in the fourt below at the Movember Term, 1912, former decree was procted, and denurrer to bill overruled. Appellant answering bill admits a death of Frank loonen. Appellant aspointment and qualification as administrator. The membership and good standing of Frank Hoonan at the time of his death in appellant's anchonge, he is suing of the certificate of membership to Frank Mosnan. The up-laws of appellant exchange, and that they were in force and effect at the time of the death of Frank Mosnan. That appellant obtained possession of said certificate ofter the death of Frank Mosnan. That appellant Frank Mosnan and caused the same to be cancelled according to

The ensure denies that Frank Woonan ever paid this the treasury of such association the sum of 1500.00. Denies Frank Moonan was at the time of his death the owner and in per empion of the certificate. Denies that all fines had been paid that all more than the certification of the certification.

or the value thereof. Denies that valid claims amounting to 300.00 have been presented for allowance against the estate of Frank Moonan, deceased.

Answer admits having certain funds in the treasury of appellant held for purposes of association. Jenies that appellant is guilty of any wrongful act or fraud.

To the answer appellee filedreplication, cause referred to laster, upon evidence heard by laster and exhibits offered the Master makes report of evidence and findings, objections of appellant to Master's finding to Court, and upon the hearing of the objections standing as exceptions to the Master's report were by the Court overruled. Decree entered finding in substance that the material allegations of the bill had been proven, and that the appelles was entitled to the relief prayed for in the bill.

The exceptions to the Master's report and the assignment of errors by appellant we may group under two propositions, the decision of which controls and disposes of all other questions raised under the assignment of errors.

Lst. The allegations of the bill giving the Court jurisdiction of the subject matter have not been proven.

2nd. The facts proven do not support the decree entered.

The argument upon the question of jurisdiction proceeds upon the theory that there was a remedy at law, in so far as the sufficiency of the averments of the bill are concerned, was disposed of in the former opinion of this Court. It is now a question whether, from the facts proven, it is a case where the Court, for its own protection, should raise of its own motion the question of the jurisdiction of the subject matter, and if it did not do so the judgment that followed would be a nullity. We do not think the facts put this case in line with the authorities cited by counsel as a case of that class. Then under the conten-

or the value thereof. Denies that valid claims rounting to \$300.00 have been presented for allowance against the estate of Frank Moonan, deceased.

Answer admits having certain funds in the treasury of mypellant pellant held for purposes of association. Denies that application is guilty of any wrongful set or fraud.

To the answer appelled filedreplication, ocuse referred to matter, upon evidence heard by laster and exhibits offered the laster makes report of evidence and findings, objections of appelled to the laster's report the objections standing as exceptions to the laster's report and that the appelled was entitled to the relief prayed for in the bill.

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sited by secret on a case of the chara. The mouse its section

for its own protection, should raise of its own motion the quesa

tion made it belongs to that class of cases where throughout
the entire proceedings and at every stage thereof the appellant
may challenge the jurisdiction of the Court of subject matter,
and if he does not do so it must be considered by the Court as
having been by appellant waived. (Phillips vs. Renfield, 240 111.,
141.) (Shedd vs. Seefeld, 126 App., 383.)

The appellant fides an answer in this case in which the jurisdiction of the Court as to the subject matteris not called to the attention of the Court, and after the hearing of the evidence the question of there being a ranedy at last is only rised by the question that there is not sufficient evidence to support the bill on jurisdictional matters, so upon that objection alone must the rights of appellant be determined. That ever is additted by the answer waives the necessity of proof by appellee. That appellee is the proper party to bring suit. That deceased Frank loonan was at the time of his decease a member in good standing of appellant's Exchange. That the certificate was issued to him and after his death under the by-laws cancelled by smallent, and the value thereof paid to other than the legal representative of his estate.

We are satisfied when these admissions are taken into consideration with the proof in this case there is at least prime facie evidence to support the allegations of the bill, and there being no evidence offered by the appellant to the centrar, the decree entered in said cause is supported by the evidence is the case.

It is not material in so far as the right of ampellecto maintain this suit is concerned whether claims had been presented, filed and allowed against the estate of Iranh momen. The arpellec under the law was given possession of all reasonal presenty owned and possessed by the decessed at the time of his death.

There being no reversible error the judgment and decree all therefore be affirmed.

[Philosophy of Affirmed.

(Not to be reported in full.)

(3)

tion made it belongs to that class of cases where throughout the entire proceedings and at every stage thereof the assollant may challenge the jurisdiction of the Court of subject entter, and if he does not do so it must be considered by the Court as having been by appellent vaived. (Phillips ve. Senfield, 246 III., 141.) (Shedd vs. Seefeld, 126 App., 353.)

The annellant fides an answer in this case in which the beller for airested tooldee at o to court and to noticeitating to the attention of the Court, and after the imering of the evidence the question of there being a remedy at law is only raised by the question that there is not sufficient evidence to emport and a mile of the fact on the contract of the contract of the contract of Whatever is edulitied must the rights of uppellant be determined. by the answer waives the necessity of proof by appeller. That That decement ind? appellee is the proper party to bring suit. Moonan was at the time of his decesse a member in good standing of appellant's Exchange. That the certificate was tessed to bim and after his death under the by-laws cancelled by specifient, and the value thereof paid to other than the legel representative of his estate.

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therefore be affirmed.

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May, A. D. 1914.
A. D. 1914. A. C. Millspaugh
Clerk of the Appellate Court.

OPINION

186A 540

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred ond fourteen.

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Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said Marc. of May, A. D. 1914, there was filed in the office of the OPINION in the words and figures following:	h term, to-wit: On the Area day ne Clerk of said Court at Mt. Vernon, Illinois, an
Λ	ERROR TO APPEAL FROM
Duint	186 I.A. 54
vo. 3 \(\times \)	Circuit COURT
October Term, 1913.	Quitan COUNTY
Opint /	

TRIALJUDGE



October Term. 1913.

Mellie Smith,

Appellant,

VS.

Appeal from Clinton County.

Alfreda Smith,

Appellee.

1861.A. 540

Opinion by Harris, J.

The facts in this case as they appear from the bill, answer and evidence of appellant and appellee may be briefly stated, as follows:

That on the 13th day of January, 1867, appellee was married to one lilliam R. Smith and lived with him for ten years. That at the November Term, 1880, of the circuit court of linton County the said William R. Brith, upon a hearing in open court was given a decree for divorce from appellee. That on the 8th day of March, 1883, the said William 1. Smith was married to appellant, with whom he lived for twenty-seven years. That at the November Term, 1905, of the circuit court of Clinton County a decree was entered in favor of appellee and against William R. Smith reviewing the proceedings and setting aside the decree entered at the Movember Term, 1880, of said Court giving William R. Smith a divorce. Appellant learned in 1904 that William R. Smith had been previously married to Alfreda Mall; that William N. Smith was a soldier drawing a pension, and after proceedings had in 1905, annulling the decree appelled drew onehalf of his pension from the United States Vovernment from that time, to his death, May 15, 1910; that after the death of villiam R. Smith, in an effort to file pension clair, appellant learns of former wife and widow and appellee learns for the first October Term, 1913.

Wellie Smith,

Appellant,

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Appellee.

Appeal from Clinton County.

1861.A. 540

Opinion by Marris, J.

The facts in this case as they appear from the bill, answer and evidence of appellant and appellee may be briefly stated, as follows:

That on the 13th day of January, 1867, appellee was merried to one William R. Smith and lived with him for ten years. That at the Movember Term, 1880, of the circuit court of whinton County the said William R. Smith, upon a hearing in onen court was given a decree for divorce from appellee, first on the 8th day of March, 1883, the said William ?. Smith was married to appellant, with whom he lived for twenty-seven years. "hat at the Movember Term, 1905, of the circuit court of Clinton County a decree was entered in favor of appellee and against William R. Smith reviewing the proceedings and setting eside the decree entered at the November Term, 1880, of said Court giving William R. Smith a divorce. Appellant learned in 1904 that William R. Smith had been prayiously married to Alfreda Hall: that William M. Smith was a coldier drawing a pension, and niter proceedings had in 1905, annulling the decree appellee drew onehalf of his pension from the United States Sovernment from that time, to his death, May 15, 1910; that after the death of william R. Smith, in an effort to file pension clair, appellant learns of former wife and widow and appellee learns for the first

time of the marriage of her husband to appellant.

That at the September Term, 1912, of the circuit court of Clinton County appellant files ner bill for review and relief against appellee. The relief asked for by appellant is the annulling and setting aside of the decree entered by said Court in in 1905 in the case of Alfreda Smith vs. William E. Smith, and for the entering of a decree nunc pro tunc of divorce in the proceedings at the November Term, 1880, of said court in the case of William E. Smith vs. Alfreda Smith.

The only allegation in the bill to excuse either appellant or deceased husband from lackes is that he was in poor health for the last six years of his lifetime and that they were without property or means, and that since the death of fillian L. Smith appellant has been compelled to make her living by day's work. The residence of appellant at the time of bringing this suit was Harwood, Lissouri. The residence of appellae was Kenosha, Wisconsin. They were aged 54 and 66 years respectively.

The record of undisputed facts in this case is the best reason why legislatures and courts have adopted laws and rules of construction favoring the termination of law suits.

Appellant was neither a necessary or proper party to the former litigation between Alfreda Smith and her husband villiam.

R. Smith, and therefore was not at the time of filing her smid bill within the law.a party entitled to the review of the former proceedings.

Appellant failed in her said bill to aver any good, sufficient and cogent reason or excuse for laches on the part of her said husband or herself for the delay in filing said bill and equity will not afford its aid in enforcing per demands unless it is apparent from the record that there are cogent and convincing reasons given for such delay.

Courts of equity will not set aside a decree on the ground

time of the marriage of her husband to appellant.

That at the September Norm, 1912, of the circuit court of Clinton County appellant files her bill for review and relief against appellee. The relief seked for by appellent is the amulling and setting saide of the decree entered by said Court in 1905, in the case of Alfreda Smith vs. William R. Smith, and for the entering of a decree nunc pro tune of divorce in the proceedings at the Fovember Term, 1880, of said court in the case of William R. Smith vs. Alfreda Smith.

The only allegation in the bill to excuse either appellant or deceased husband from laches is that he was in poor health for the last six years of his lifetime and that they were with out property or means, and that since the death of villien it.

Smith appellant has been compelled to make her living by day's work. The residence of appellant at the time of bringing this suit was Harwood, kissouri. The residence of appellae was Kanosha, Wisconsin. They were aged 54 and 66 years resmectively. The record of undisputed facts in this case is the heat reason why legislatures and courts have adopted laws and rules of construction favoring the termination of law suits.

Appellant, was neither a necessary or proper party to the former litigation between Alfreda Smith and her husband Tilliam R. Smith, and therefore was not at the time of filing her said bill within the law, a party entitled to the review of the former proceedings.

end copent reason or excuse for lackes on the part of her said husband or herself for the delay in filing said bill and equity will not afford its aid in enforcing her demands unless it is apparent from the record that there are capent and convincing reasons given for such delay.

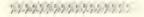
Courts of equity will not set acide a decree on the ground

that it was obtained by false evidence but only for fraud, which gives the court colorable jurisdiction, and under the averagents of the acts of fraud not conclusions clear and satisfactory proof thereof must appear to the Court before a decree should be set aside.

Our statute makes a decree after three years binding on the parties and all persons claiming under them by virtue of any act done subsequent to the commencement of such suit.

The judgment of the Circuit Court in dismissing the bill forwant of equity wasright and it will be affirmed.

Affirmed.



(Not to be reported in full.)

etten steer of the court charmon but we court charmon by formal and a court charmon by the court of the court before a decree should be set aside.

The milion of the commencement of such suit.

The judgment of the Circuit Court in dimmirsing the bill forwant of equity wasright and it will be affirmed.

(Int to be reported in full.)

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I, A, C, MILLSP	AUGH, Clerk of the Appel	late Court, within and f	or the Fourth District of the
			y of the OPINION of the said
	above entitled cause of reco		, .,
			ffixed the seal of said Court
114 112	at Mt. Vernon, this		day of May,
	A. D. 1914.	. Millspan	igh,
		Clerk of th	e Appellate Court.

OPINION

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18i A551

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March term, to-wit:	on the	1-1		day
of May, A. D. 1914, there was filed in the office of the Clerk of said	Court	at Mt.	Vernon,	Illinois, an
OPINION in the words and figures following:				
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Quelit

VS.

October Term, 1913.

ERROR TO APPEAL FROM

186 I.A. 551

Cereur COURT

Papel COUNTY

TRIALJUDGE

Hon W M Butter



October Term, A. D. 1913.

J. W. Gullett,

Appellee,

V.

Appeal from Pope.

Illinois Central Railroad Company,

A ppellant.

186 A 551

Opinion by Higbee, J.

This suit was begun by appellee before a justice of the peace, where he obtained a judgment of 145.00 for disages claimed ed to have been occasioned to a permut rosster in the course of its shipment, upon appellant's railroad. (n appeal to the circuit court, there was a verdict and judgment in favor of appellee for \$30.00. All the instructions except a percaptor; one, presented by appellant, were given by the court below.

On appeal to this court appellant complains there was a lack of evidence to sustain the verdict, and that its rights were prejudiced by the giving of certain instructions offeredly appellec.

vender and owned a popular roaster, which he had surchased for \$20.00; that after purchasing the same he had a plumber do some work on it and also spent a week of his own time repairing and painting it; that on October 1.1911, after the machine had been put in repair, he, intending to use it at the lope county lair then about to open, shipped it by freight from Carlybe, Itlianis, to Golconda, Illinois; that it was delivered to the squat of the Beltimere and Chio Fouth Western Railroad at Carlybe, and was transferred in regular course of shipment to appallant's railroad at Odin; that when the roaster reached its destination at Golconda, it was found the place in it was broken, the wheels

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Appeal of the last

Opinion by Higher, J.

This suit was no, mutry ensites terves a justice of the peace, where he obtained a judgment of the CO fer it to an although to have been accessioned to a percent reaster in the course of the abipaent, upon appellant's mullroad. In a must a teactracture out court, there was a verdict and judgment in favor as appellant court, there was a verdict and judgment in favor as appelled for \$30.00. All the instructions encest a researchery one, presented by appellant, were given by the court below.

On appeal to this court openishes amminist there is a superior of evidence to seath the virus verdict, and the Literians are constituted.

It appeared from the resolvent the tree life or a content vender and ewood a population to the resolvent of the result of the content of the painting it; the ten (cloier ', 1921, . Iter the certical and been put in repair, he, intending to use it at the lare cent, he is the content of then about to epen, sides of the treign the lare cent, he is then about to epen, sides of the treign the lare to the spect of the following to the same to Golconda, Illicois; that it was delivered to the spect of the tree of chiracter of the century and the treed in regular content the spect of the century reader the century that and condend it was found the place as it was broken, the circular of colored, it was found the place as it was broken, the circular of colored, it was found the place as it was broken, the circular the colored, it was found the place as it was broken, the circular the colored, it was found the place as it was broken, the circular of colored, it was found the place as it was broken, the circular the

twisted, pipes bent and the governor gone.

The questions of fact presented are (first), was the reaster in good condition when received; (second), was it cruted when presented for shipment and (third) was it shipped at the owners risk. As to the condition when shipped, appelled testified that it was then all right and that he had spent over 50. for repairs on it and one of appellant's witnesses, a telegraph operator at the point of shipment, also testified to facts tending to show that it was in good condition when it was tendered for shipment. There was no contradictory evidence in this subject and it must be taken as proven that the reaster was in good condition when shipped.

Upon the question of whether the roaster was crated or not when delivered for shipment, the evidence was contradictors but there was sufficient evidence in the proof to support the statement of appellee upon the witness stand that it was crated when delivered to the railroad company for shipment.

The agent for the Baltimore and Chio Southwestern Railroad Company at Carlyle, testified that ameliae told him if the company would not require the resater to be crated he would assure all responsibility and make no claim for breakage and in this he was corroborated by other employes of said railroad at the shipping point. The testimony of appellee, however, was to the effect that he understood the reaster was to be slipped as first classfreight and that a bill of lading massiven him which after the controversy arose between him and appellant, concerning his claim for damages, was delivered to appellant and not returned to him, although he demanded the same.

The jury appear to have taken appellee's version of the matter and upon the whole case we cannot say that their verdict was not warranted by the proofs.

Instruction No. 1 given for appellee, which defines the common law liability of a common carrier, is complained of by

twicted, piper bent and the governerd gone.

The questions of fact presented are (first), we the rosster in good condition when received; (second), was it crated when presented for chimsent and (third) was it chimsed at the owners risk. As to the condition when shipped, specifies tastified that it was then all right and that he had spert ever to. for repairs on it and one of equilibrates withcreas, a teleral aperator at the point of chimsest, sine testified to races tending to show that it was in good condition show it was in good condition show it was in good condition when a taken as proven that the rosster was in good condition when altitudes

Upon the question of whether the rester was crated or may when delivered for shipment, the evidence was controlletiont evidence in the preof to cupport the state-there was sufficient evidence in the preof to cupport the state-delivered to the railroad company for shipsect.

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The jury appear to have taken nevelles a version of the motion and upon the whole and we councit say that well was seen in the sees that

Instruction No. 1 piven for appoiles, which defined the common law limbility of a common corrier, is convented off.

appellant, as being improper under the facts in this case. It however states a correct proposition of law and appellee had a right to have the jury instructed upon the law bearing upon his own theory of the case, which there was proof to support. The other objections to the instructions given for appellee do not appear to us to be of a serious nature and upon the whole the series of instructions correctly lawred the jury concerning the law applicable to the case.

The judgment of the court below will be affirmed.

Affimaed.

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(Not to be publishedin full.)

note the series of instructions for the last vectors with the concerning the applications of the instructions piven for numelles do not appear to us to be of a serious withs whole the series of instructions correctly independent at the law applicable to the case.

The judgment of the court below will be siringed.

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lot to be sublishedin full.)

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May,
A. D. 1914. Z. C. Millspaugh.
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Clerk of the Appellate Court.

OPINION

186 ASIS

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March	term, to-wit: On the / day day
of May, A. D. 1914, there was filed in the office of the	e Clerk of said Court at Mt. Vernon, Illinois, an
OPINION in the words and figures following:	
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	ERROR TO
0	APPEAL FROM
	AT LEAD PROM
In Beoples &	
Circo Caraly	
	186 I.A. 562
vs.	Cycut COURT
No. 2	
October Term, 1913.	
	Jayill COUNTY
m 111	
Morning	

TRIAL JUDGE



October Term, 1913.

The People of the State of Illinois,

Defendant in Error,

Error to Tayette.

Los Moreland,

Flaintiff in Error.)

JOSTA. 562

Opinion by Eighde, J.

At the "ebruary term, 1913, of the circuit court of Payette County, the grand jury returned an indict ent of two counts. charging in the first, the plaintiff is error, los verelund and Yaud inson were living together at and within said county on the 15th day of January, 1913, in an open state of adultery and fornication, the said los Foreland being then and there a married man and the said and Finson being then and there a single and unmarried woman. The second count charged to t said for oreland and Faud linson at said time and place lived together in on open state of adultery, the said los Noreland being then and there a married man and the said Waud Tinson being then and there - ---ried woman. Plaintiff in error was tried alone and at the donclusion of the trial the jury returned the following verdict: "We the jury find the defendant los wereland guilty of adultery in manner and form as charged in the indictment. The court having denied a motion for a new trial and in arrest of judgment, sentenced plaintiff in error to pay a fine of one hundred dollars and the costs and to stand committed to the county jail until fine and costs were paid.

It appeared from the proofs that plaintiff in error was married at the time he was charged with consitting the offence charged in the indictment but that hand Finson was divorced from her husband, so that a conviction could only have been had under the Cetober Term, 1915.

The People of the State of .ulinniir. Defendant in Arror. . DV

Los Moreland,

Error to suretie.

Plaintiff in Breat. 1967 A. 568

Opinion by Highee, J.

At the february term, 1913, of the circuit court of layette County, the grand jury returned an indictment of two counts. charging in the first, the plaintiff in error, les leveland and Maud Finson were living together at and within soid county on the 15th day of January, 1915, in an open state of adultery and fornication, the said Los Foreland being them and there a married man and the said Yaud Pinson being then and there a single and unmarried woman. The escend count charged that said Los Foreland made we wi tedfagot bevil sould bus smit bies to neguit bus bus state of adultery, the said los Moreland being then and there a warried man and the sold Parant Place of the man being -nee oil ja bne saola herri saw rerre at Trintal'i . namow beir clusion of the trial the jury returned the following verdict: "We the jury find the defendant Los Moreland guilty of adultery -ved from as charged in the indictment." The court havstrongbut to Justia at has fairs won a rol neiton a boineb gai exalled barbond and to emit a year of retts of this is a beenefuse littu list vinues sat of bedicames backs of bas etaes and bas fine and costs were paid.

-un. pur rours at littaining that short suf mort berseque fl rice the time he was charact with committing the offere cirrar Ted mort begrovib asw mosnil bus" tadt tud frantsibat edt at be buoband, so that a conviction could only inve been ind under the first count of the indictment, charging the parties named with living together in an open state of adultery and fornication. In Searls v. People, 13 Ill., 597, where there was an indictment against a man and woman charging them with living together in an open state of fornication, the court in discussing the question of what was necessary to constitute the oflense said. "In order to genetitute this crime the parties must dwell together openly and notoriously upon terms as if the conjugal relation existed between them. In other words they must cohabit together. There must be an habitual illicit intercourse between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public degency, having a demoralizing and debasion influeence upon society." The offense named in the statute and charged in the indictment is the living together in an open state of adultery and fornication. The commission of edultery or formication, however immoral, is not a crime under our statutes, but to constitute a crime there must be an open living together by the parties in such a state.

The jury did not find plaintiff in error guilty or openly living in such state with the woman named, which would have been a punishable crime, but did find him guilty of adultery alone which is not a statutory crime. In Janusel v. The scople, 113 Ill. App., 73, wherein an indictment was returned charging the parties with living together in an open state of adultery and fornication, the jury returned separate verdicts, finding the woman guilty of adultery in manner and form as charged in the indictment and the man guilty of fornication in manner and form as charged in the indictment and the court found the verdict not responsive to the indictment and reversed and remanded the case,

first count of the indictment, charging the parties named with living together in an open state of adultery and fornication, In Searle v. People, 13 Ill., 597, where there was an indictwill not a main a man were a charact and a man a fundame from in an open state of fornication, the court in discussing the question of what was necessary to constitute the offense said. "In order to monstitute this erise the parties must duell together openly and notoriously upen terms as if the contamnal relation existed between them. In other words they sust echabit together. There must be an halitual illicit intercourse between them. The object of the statute was to are thit the public season and discrete of the living terether of versues of opposite sexes notoriously in illicit intimacy, which outrages public desency, having a demoralizing and debasing infige ence upon society. "The offense named in the statute and charged in the indicteent is the living tegether in one state or shultery and fornication. The commission of adultary or formi-Saffon, have yet temperal, is not a crim ander our shitules, but to constitute a crime there must be an open living tagether by de parties in each a state.

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charged in the indictment as a substantial of ease. Neither considered alone is a statutory crime in this state and neither is indictable at common law... neither fornication nor adultery, considered alone being a crime or charged as such in the indictment, the verdict is not responsive to the indictment, which charges the offense of unlawfully living tagether in an open state of adultery and fornication. We think it is too plain to require argument that the verdict does not find the plaintiffs in error were living together in an open state of adultery and fornication. The verdict therefore is not marriclent on which to base a judgment."

The reasoning in the bove case applies with equal force to it the case presented here and as the verdict is not responsive to the indictment and does not find the plaintiff in error guilty of a crime under our statutes, the judgment which followed the same cannot be sustained. It is unnecessary to discuss the other questions raised by counsel for plaintiff in error, as apart from those relating to the sufficiency of the widence to sustain a conviction, they are of such a nature as to be readily and presently adjusted in any future trial which may take place. Its judgment will be reversed and the cause remanded.

Reversed and remanded.

(Not to be reported in full.)

eaving in its opinion: "Neither adultery not fornication is charged in the indictment as a substantial offense. Feither considered alone is a statutory crime in this state and neither the majoration of the indiction, and the indictment, the verdict is not responsive to the indictment, the verdict is not responsive to the indictment, which charges the offense of unlawfully living together in an open state of adultery and fornication. We think it is too plain to require argument that the verdict does not find the plain to require argument that the verdict does not find the delicity and fornication. The verdict therefore is not sufficient adultery and fornication. The verdict therefore is not sufficient on the life in the content of the life in the content of the content of the life in the content of the life.

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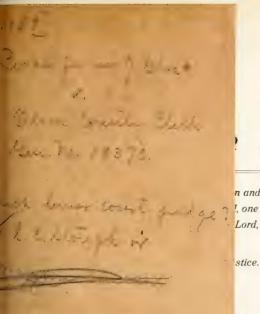
Life's he stoneted in rolls.

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May,
A. D. 1914. 7 7 7 7 7 7 7 7 7 7 7 7 7 7 7 7 7 7 7
A. D. 1914. Z. C. Millspaugh
Clerk of the Appellate Court.

OPINION

121

Fee \$



1005

Appellate Court

n and held at Mt. Vernon, Illinois, on the Fourth Tuesday !, one thousand nine hundred and fourteen, the same be-Lord, one thousand nine hundred and fourteen.

W. S. PAYNE, Sheriff.

March term, to-wit: On the day e of the Clerk of said Court at Mt. Vernon, Illinois, an

> ERROR TO APPEAL FROM

186 I.A. 563

Circuit

October Term, 1913.

TRIALJUDGE

Hon WEAt alley



186 A 56.3



Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

	And afterwards in	Vacation,	after said	March te	erm, to-wit:	On the	1-	4			day
of Mo	y, A. D. 1914, there	was filed i	n the offic	e of the C	Clerk of said	Court	at	Mt.	Vernon,	Illinois,	an
<i>OPIN</i>	ION in the words a	nd figures ;	following:					*.			
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ob la vs.

October Term, 1913.

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ERROR TO APPÉAL FROM

186 I.A. 563

Pircint

COURT

Marieon COUNTY

TRIALJUDGE

Hon WEStasley



October Term. 1913.

John B. Schmoeller et al.,

Appellees,

vs.

Henry Schmoeller,

Appellant.

186 I.A. 569

Opinion by Higbee, J.

Appellees John 2. Schmoeller and his Brother Walter
Schmoeller, brought suit against appellant henry Schmoeller and
others for the partition of certain real estate formerly owned
by their father and mother, John 3. Schmoeller and Lena Schmoeller, both deceased. The bill also asked that appellant henry
Schmoeller be required to account for the rents of a portion of
the premises which had been occupied by him after the death of
the said John 3. Schmoeller. The decree in the court below
granted the prayer for partition, directed the payment of certain mortgage indebtedness and also ordered that appellant
Henry Schmoeller, pay to the other parties in interest, the sur
of \$25.00 a month from October 31, 1911, for rent of the premise a
occupied by him: Henry Schmoeller has appealed from that portion
of the decree requiring him to pay rent for said premises and
presents the record relating to the same, to this court for review.

The proofs in the case show that on October 17, 1910, Iena Schmoeller died testate at her homein Alton, Illinois, seized of lots one and two in block ten of the addition of Pope and Others to said city. On said lot two was a six room dwelling house, which was her home, and a shop. By her will she devised her property to her husband, John W. Schmoeller for life, with mower to manage, lease, mortgage and convey the same in fee simple, with the further provision that at his death, the same should go to

Term No. 26.

Agenda No. 23.

Outsber farm, 1913.

John B. Schmoeller et al.,

. BY

Henry Schwooller,

Appellant.

Appeal from Madison.

186 I.A. 569

Opinion by Higbee, J.

Appellees John E. Schmoeller and his Prother Malter College Sohn S. Schmoeller and Appellant Henry College Col

The proofs in the case show that on October 17, 1910. Lena delication discussion that some and two in block ten of the addition of Pope and Others to said city. On said lot two was a six room dwelling house, which was her home, and a shop. By her will she deviced her premerty an ner hundred, John . Manmooller for 111, with one to manage, lease, mortgage and convey the same in fee simple, with the further provision that at his death, the same should go te

and become the absolute property of their children. Afterwards on September 25, 1911, her husband, said John . Schmoeller, died intestate, never having disposed of said property. At the time of his death, he owned an undivided half of certain other real estate in Madison County and this suit included that as well as the property formerly owned by his wife in her life time. Shortly before the death of the father, John W. Schweeller, the appellant Henry Schmoeller, with his wife and child, oved into the house located on said lot No. two and occupied the same with him. After the death of the father, Henry with his family, continued to occupy the property, using both the dwelling house and the shop located on said premises and was occupying the same at the time this suit was brought. Upon the hearing before the master in chancery, to whom the case was referred, sever I witnesses testified that on October 30, 1911, there was a meeting between appellant Henry Schmoeller and a number of the appelless at the office of a friend, where the question of the amount of rent to be paid by Henry, was the subject of discussion; that it resulted in an agreement, waxmade by Henry to pay the tenants in common a rent of \$25.00 a month for the premises occupied by him.

On the other hand Henry testified that he did not agree to pay said sum of \$25.00 a month for the use of said premises. The master found in favor of appellees and that Henry should pay his co-tenants the sum of \$25.00 a month and the court decreed that he pay said amount from October 31, 1911, as rental, for said premises and also found that said amount was a reasonable compensation for the use of said premises. The weight of the proof would seem to support the finding of the master and the decree of the court that the agreement to pay rental at the sum named as claimed by appellees, was really made but even if that is the case, we are of opinion it was not such an agreement as could be enforced, for the reason that one of the sault tenants in common

and become the absolute property of their children. Afterwards on September 25, 1911, her husband, said John . Schmoeller, died intestate, never having disposed of said property. time of his death, he owned an undivided half of certain climit Ifaw as jedy behalf in it is and this and this select in Jack at a state last as the property formerly owned by his wife in her life time. Shortly before the death of the father, John W. Schmoeller, the appellant Henry Schmoeller, with his wife and child, oved into the house located on said let No. two and occupied the same with him. After the death of the father, Nepry with his family, continued to occupy the property, using both the dwelling house "nd the shop located on said premises and was occupying the same at the time this suit was brought. Upon the hearing before the master in chancery, to whom the case was referred, second atnesses testified that on October 30, 1911, there was a meeting restinges out to redson a bas religionally well appearance restinger in fourth oil to noise the question of the amount of rent to be paid by Henry, was the subject of discussion; that it swewlited to an agreement, examede by Henry to pay the tennets as on so rent of \$25.00 a month for the premises occuried by him.

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was not present when the agreement was made and there was no one who was authorized to act for the minors interested in said premises, of whom there were several. Appellant Henry Schmoeller however, should be held to pay a reasonable rent for the occupation of said premises since the death of his father and as the evidence fails to disclose what would amount to a reasonable rent for said premises during its occupation by said appellant, the decree must be reversed and the cause remanded with directions to the court below to ascertain the reasonable rental value of said premises from the death of the father, John J. Schmoeller.

There is some proof tending to show that some of the appelllees occupied the premises with appellant, Henry Schmellerfor a time after the death of John W. Schmoeller and whether such is the fact should also be definitely determined. If it should uppear that appellant Henry Schwoeller occupied the premises alone, during the time in question, the decree sould provide that he should pay the amount found to be a reasonable rental therefor. If however, it should be proven that some of the appellees occupied the premises with him for a portion of said time, they should be decreed to pay their just proportion of the rent, according to the length of time they shared the occupation of the premises. The decree should further provide that said rent should be paid to the master in chancery for distribution among all of the tenants in common, each to share in the same, in proportion to his or her interest in the real estate, including the one or ones who shall be found liable to pay the same.

The decree will be reversed and the cause remanded for further proceedings in accordance with the directions above given.

Reversed and remanded with directions.

(Not to be reported in full.)

was not present when the agreement was made and there was no one who was authorized to act for the minors interested in said premises, of whom there were several. Appellant heary Schmoeller however, should be held to pay a reasonable rent for the occupation of said premises since the death of his father and as the evidence fails to disclose what would amount to a reasonable rent for said premises during its occupation by said appellant; the decree must be reversed and the cause remanded with directions to the court below to ascertain the reasonable rental value of caid premises from the death of the father, John W. Schmoeller.

- in There is some proof tending to shot bast some of the same less complet the grantees with appailant, Manry Salve Service. al doug radised bas reliseasies. W moot to diseb sai testa smit a the fact should also be definitely determined. If it should appear that appelled Henry Belmoeller docupied the procless whom, ad fadt abivore blueds serseb adt, meitesup at sait adt gatrub should may the munumit found to be a reasonable routel teareror. if however, it should be proven that ages of the states onounded the premises with him for a particular of said time. Carr abould be decreed to pay their just proportion of the rent, according to the length of time they shared the occupation of the premises. The decree should further provide that said rent should be paid to the master in chancery for distribution smong all of the tenants in common, each to share in the same, in proparties to his or her interwet to the real sector, including the one or ones who shall be found limble to pay the same.

The degree will be reversed and the cause remanded for further proceedings in accordance with the directions above given.

Reversed and remarked with directions.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this day of May,
A. D. 1914. A. C. Millspanigh
Clerk of the Appellate Court.
Cierk of the Appendic Court.

OPINION

Fee \$

186 H 36 5

1006

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March	term, to-wit: On the day
of May, A. D. 1914, there was filed in the office of the	e Clerk of said Cour <mark>t</mark> at Mt. Vernon, Illinois, an
OPINION in the words and figures following:	:
•	I I
	ERROR TO
Λ	APPEAL FROM
There	
	486 I.A. 565
	1001
_	Q'A
Z / vs.	COURT
No.	
October Term, 1913.	0
	8 CH.
	C. Mauro COUNTY
0000	
Willwarker -	/
Michaeles Don's	

TRIAL JUDGE

Hon WE Hadley



October Term, 1913.

Richard S-lack.

Appellee,

vs.

Wilwaukee-Nechanics In-Burance Company, Appellant. Appeal from the City Court of East Ct. Louis.

Opinion by Nigbee, J.

186 I.A. 565

This is an appeal from a judgment for \$750.00 rendered in favor of appellee, in a suit based on an insurance policy, issued to him by appellent. The suit gree out of the following facts:

On June 4, 1911, appellee with his wife and son lived in a rented house, consisting of wix rooms, both and basement, In Mast St. Louis. A bout two o'clock in the sorning of that day, while his wife was in St. Louis and appellee and his con away on a fishing trip, the house caught fire and it and its contents were partially destroyed. Appelled had four 1,000.00 insurance policies on the contents of the house in four different companies and being unable to affect a metalement, brought suit against the respective companies upon the policies, In a suit against the Security Insurance "cannny, appelled recovered a judgment for 175,00 5.69 in the city court of met t. louis. An appeal was taken by the company to this court, where the judgment was reversed and the cause remanded. (Black v. Jecurity Ing. to. __ Ill. App. __ O The pleadings in that case and the present one, appear to be identical and while the evidence in this case differs from the evidence in the somer case in some minor particulars, there were no such substantial additions or variations as to induce the court to change at views on to the proofs, as indicated in the opinion in the former once.

October Term, 1913.

Richard S-lack,

Appealings

. gv

Milmaukee-Mechanics Insurance Company,

Drivium or mighas, f.

Appellant.

Appeal from the City Court of East Ct. Louis.

486 I.A. 565

This is an appeal from a judgment for 1750.00 rendered in favor of appellee, in a suit based on an incurence policy, issued to him by appellant. The suit grew out of the following facto:

on June 4, 1911, appellee with his wife and son lived in a rented house, consisting of six rooms, bath and basement, in East St. Louis. A bout two o'clock in the morning of that day, while his wife was in St. Louis and appellee and his sen away on a fishing trip, the house caught fire and it and its contents were partially destroyed. Appellas had four "1,000.00 rearrance policies on the contents of the house in four different companies and being unable to effect a settlement, brought r mi .seistles the respective companies upon the policies. suit against the Security Insurance ompany, appelled recovered a judgment for \$775.00 in the city court of Last it. Tenis. in appeal was taken by the company to this court, where the judgment was reversed and the cause remanded. (Clack v. Becurity Inc. Co. 111. App. 0 The pleadings in that case and the present one, appear to be identical and while the evidence at east of the end the ended in the court are the east and in some minor particulate, there were no such substantial additions of sa revers it is the court to change its views of the proofs, as indicated in the coint at a torre case.

Among other errors assigned in both cases, on appeal, were that the city court of ast St. Louis had no jurisdiction over cases of this class and that the same should have been dismissed at the second term of the court, on account of appellee's failure to file a copy of the instrument sued on.

These questions are so fully discussed and our views in regard to the same so fully set forth in the ominion in the case against the security insurance company(supre) that to go into a discussion of the same again in this opinion, would sinply be a reiteration of what is there set forth and it is sufficient in this case to state that upon further consideration we adhere to the views expressed in the former opinion upon these questions. Appellant in this case, particularly complains of the failure of the court to give an instruction offered by it on the question of damages which told the jury that if they believed from all the evidence, "that immediately after the fige the property alleged to have been damaged, was taken possession of by the police or fire department of the city of ast It. Louis and that this department refused to permit the plaintiff lack to enter the premises to protect the property from damage other er than that arising from the fire, then you arefurther instructed that even though you may believe the plaintiff entitled to damages caused by the fire, yet you would not be allowed, under the law and such evidence to assess any damages to the presenty, which grew out of the fact that plaintiff was not permitted to take possession, as under its policy, the defendant insurance company could not be held liable for such damages; if the evidence shows any such demages. This instruction differs from the one referred to in the opinion in the ecurity limitance Company case as appearing to assume that there were damages to the projecty resulting from the fact that appellee was not sermitted to take possession of his property at once after the fire, Arong other errors assigned in beth cases, on appeal, were that the city court of hast 3t. Louis had no jurisdiction over cases of this class and that the same should have been dismissed at the second term of the court, on account of appelled a failure to file a copy of the instrument sued on.

These questions are so fully discussed and our views is end at notines end at fittel toe glist on ame out of bris case against the becurity insurance Cemeany (supra) that to se into a discussion of the same again in this opinion, sould ninply be a reiteration of what is there set forth and it is surficient in this case to state that upon further consideration we adhere to the views expressed in the former oranion upon there questions, appellent in this ones, marinelarly reclient of the failure of the court to give an instruction effered by it on the question of damages which told the jury that if they belleved from all the cyticans, 'snot hereited beyelled the property alleged to have been damaged, was taken possession of by the police or fire department of the city of seet it. Louis for I littaining and times of beauter themtrape aids that bas to enter the premises to protect the premerty from damage offier than that arising from the fire, then you arefurther instructed that even though you may believe the plaintiff entitled to damages caused by the fire, yet you would not be allowed, under the law and such evidence to assess any damages to the promerty. which grew out of the fact that plaintiff was not permitted to take possession, as under its policy, the defendant insurance company could not be bold liable for such damages; if the cyldence shows any such damagos. " This instruction differs from the one referred to in the opinion in the Security Insurance Company uses no anyearing in weroms that there were thought to -tor for were sellegge feet that feet all most guiffusor grapping and attitud to some consequence of the property of more of the large in that it plainly leaves that question to the jury by the words. "If the evidence shows any such damages."

desired to enter his house and care for and remove his property after the fire, but was not allowed to do so by the chief of police and that the refused of the chief of police to permit him to enter, was because of suggestions of the agents of the insurance companies, and a custom of the police to take charge of such matters until such time as the police to take charge to enter, and that by remon of such facts appellant should not be permitted any allowance for or to take advantage of the fact that some of the property was injured by neglect and exposure after the fire. The effect of the instruction was to hold that the appellant could not be held liable for any damages other than those arising from the fire.

The contract of insurance as set out in the policy, insured appelled "against all direct loss or damage by fire", such being the contract it does not occur to us how appelled gould recover thereon for "damages other than that arising from the fire" asstated in the instruction. This suit is brought upon the contract of insurance and not for damages resulting from any promptul act of appellant and consequently the right of recovery must describe upon the terms of the centract. The policy further provides that appellant "shall not be liable for any lose caused directly or indirectly by order of any civil authority or by theft or by neglect of the insured to use all responsible adding to save and preserve the property at and after the fire." This provision expressly excluded recovery for love enused by order of any divil authority", and in a suit upon the contract, amelian evidently could not recover for any such loss. The instruction on offered by appellant should have been given.

in that it plainly leaves that questlen to the jury by the words. "If the evidence shows any such damages."

It was the contention of expeller upon the trial that he desired to enter his house and care for and remove his property after the fire, but was not allowed to do so by the citeff of police and that the refusal of the chief of police to permit him to enter, was because of suggestions of the agents of the insurance companies, and a custom of the police to take churge of such setters until such time as the owner should be remitted to enter, and that by reason of such facts appellant should not the permitted any allowance for or to take adventage of the fact that sees of the property was injured by neglect and exposure after the fire. The effect of the instruction was to hold that the appellant could not be held liable for any damages other than those arising from the fire.

bargani, voiled odi ni tuo toa as sonargani to teatraco on? poled there . The to assent to each durable lie tentens" well some the cantract it does not so of an object to does it tagings will es "sail sait meal gataire Jady neels raite consende tol morrell stated in the instruction. This suit is brought upon the contract to interest and not for deserge resulting from one wrongful set of appellant and capsequently the right of receiver, surt decent schivers to the contract of the pair of the series of the vijostib bennes anol yar tal eldaif ed for finde" inallegga tadi or indirectly ... by order of any civil suthority or by theft or by neglect of the insured to use all reasonable means to paye and preserve the property at and after the tire. " This provision expressly excluded recevery for less caused "by order of any civil authority"; and in a suit upon the centreet, espelling evident--to as notinested and the need does to reverse ten blues vi fored by appellant should have been given.

Appeliant further complains that the proof of loss was permitted to go to the jury generally and not alone to show compliance with the provision of the policy relating to furnishing proof of less in case of fire. Appellee on the other hand, contends that this is not the case but insists that anpellee and wife made out a list of articles destroyed and furnished it to the adjuster to prepare the proof of less; that the adjuster had several copies of the list made and the mean in evidence was one of these copies and this contaction of another was established by the proof. Appellee testifiedly had no independent recollection of the articles destroyed without referring to the list and we think he was entitled to refer in the list to refresh his recollection as to "hat was destroyed. The list however had the value of each article laged opposite to the same and it should not have been permitted to go to the jury. The list used in this case was identical with the one ottomac to the proof of loss in this and also in the case against the courity Insurance Company above referred to, and in this as in the former case the list included family clothing, amounting to some (1,300.00 which was shown to have been worn one or three years, and household goods and furniture, which had been and from one to a number of years. Appellee and his wife toutified as to the fair cash value of each article and aloced such value at the cost price, when new as war done in the forcer come. In this case, appelled also testified that of 4,305.90 worth of goods shown, by the list and his testimony, to have been destroy ed, some \$2,441.80 worth, were tought at holes to and sere worth at retail [1,076,72 more than that amount and that the full amount of his loss was therefore \$5,462.62.

The policy contained the further provision that "this company shall not be liable beyond the setual cash value of the

and seel to leave and and anisignos raditul inclinged . werde of eners des bas vilaremen vrui ent of og of bettimreg compliance with the provision of the policy relating to irraishing proof of logs in case of fire. Appelles on the other hand, contends that this is not the case but insists that anpolice and wife made out a list of orticles destroyed and larmighed it to the adjuster to prepare the proof of lass; that the ni re an ads bus sher saif out to saiges largue bud rejenthe evidence was one of these copies and this contention of a pallee was established by the proof. Appelles testifiedhe had no independent recollection of the articles destroyed without referring to the list and we think he was outified to refer to the list to refresh his recollection as to what was dectroyed. -he of efficação benela elejtra dese lo sulay ell bad revevad fail the same and it should not have been permitted to go to the jury. bedorida one edf ditw lastidebt was ones eidt in best jatl od! odd jauigas eras odd, al cals bas sidd at smol to loorg add od Security lacurence Company above referred to, and in this as in the former case the list included family clothing, accounting to some 11,300.00 which was shown to have been worn one or more years, and household goods and furniture, which had been need from one; to a number of years. Appellee and his wife testified au to the fair cash value of each article and placed week value of proce-rearrow and not more one or more carbo , noting door one day in dirow 00.335.44 to sent bailites cala calleggs, sees eids goods shown, by the list and his testisony, to have been destrop ed, some \$2,441.80 worth, were bought at cholesele and were Not all your had become that mind exce by \$000 all linder to affine emount of his loss was therefore 15,462.62.

The policy contained the further provision that "this cor-

property at the time any loss or damage occurs and the loss or damage shall be escertained or estimated according to such actual cash value with proper deductions for depreciations however caused."

As the judgment in this case wasfor \$750.00 the actual cash value must therefore have been found to have been \$3,000.00 on all the property destroyed, as the insurance on the property amounted to \$4,000.00 and appellant's policy carried and \$1000 or one fourth of that amount.

The reasoning sdopted by this court in the opinion against the Security Insurance Company above referred to in regard to the improper manner in which he fair each value of the destroyed and injured property was determine, implies with a wall I ree, to this case. It is evident here asin the former case, that the jury in fixing the value of the property in question, must have been controlled in a large degree by the proof on the part of appelled, which was based on the nurchase price of the property instead of the actual cash value at the time of the loss.

The judgment in this case will be reversed and the cause remended.

Heversed and remanded.

(Not to be reported in full.)

property at the time any less or damage eccurs and the less or damage shall be accertained or estimated according to such actual such value with proper deductions for depreciations however caused."

and value must therefore have been found to have been \$3,000.000 on all the property destroyed, as the insurance on the property destroyed, as the insurance on the property destroyed.

The reasoning adopted by this court in the opinion spainst the Socurity Insurance Company above referred to in regard to the improper manner in which the fair cash value of the destroyed and injured property was determined, replies with equal force, to this case. It is evident here asia the former case, that the jury in fixing the value of the property in question, such have been controlled in a large degree by the proof on the part of appellee, which was based on the purchase price of the procesty ingteed of the natural cash value at the time of the less.

. The judgment in this case will be reversed and the cames

lieversed and remained.

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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this /s/ day of May,
A. D. 1914. A. C. Millspanich Clerk of the Appellate Court.
Clerk of the Appellate Court.

OPINION

186 A 582

1001

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon; Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PA YNE, Sheriff.

And afterwards in Vacation, after said March term, to-wit:

on the day
of May, A. D. 1914, there was filed in the office of the Clerk of said
Court at Mt. Vernon, Illinois, an
OPINION in the words and figures following:

ERROR TO
APPEAL FROM

186 I.A. 582

Vs.

No. 45

October Term, 1913.

COUNTY

TRIALJUDGE

Hon WE Stadley



October Term, 1913.

Michael Schroeder,

Appellee,

VS.

East St. Louis and Suburban Railway Company, Appellant.

Appeal from Madison.

Opinion by Highes, J.

1861.A. 582

This suit was brought by Michael Mehraeder, appellas, against appellant, to recover damages for personal injuries received by him, through the alleged negligence of appellant, in operating one of its cars, by means of which he, while riding as a passenger thereon, was violently thrown to the ground.

There is but one count in the declaration and the negligence therein averred, is that as the car approached within about sixty feet of lectaire, the station where appellee had informed the conductor he wished to get off and where he was informed the car would be stopped for his, he rang the bell as a signal to the employes of appellant operating the car to stop the same; that thereupon the speed of the car stackened and he walked to the back platform and stood there awaiting the stopping of the car to alight therefrom; that instead of stopping the car, there in charge thereof, negligently and carclessly suddenly started the same at a greater speed, thereby causing the car to take a sudden start or lunge and causing appellee who was using due care for his own safety, to unavoidably loss his balance and fall aff. The general issue was filedand the trial resulted in a verdict and judgment in favor of appellee for \$400.00.

Appellant asserts as reasons why the judgment of the court below should be reversed, that the verdict is not sustained by October Term, 1913.

Midnest Schroeder,

Appellee.

w BV

East St. Louis andSuburban

Appost from Madison.

Opinion by Mighes, J.

186 I.A. 582

This suit was brought by Michael Schroeder, ampolled, against appelled, as recover desired for common injuries second in the alleged meditance of appelled, in order in one of its cars, by means of which he, while riding as a passonger thereon, was violently thrown to the ground.

There is but one count in the declaration and the negligenessisting apertus secret, in the term the out continued distinguished the feet of Leclaire, the station where appelles had informed the conductor he wished to get off and where he was informed the ear would be stopped for him, he rang the hell as a signal to the employes of appellant operating the ear to step the sene; that thereupon the speed of the ear slackened and he walked to the back platform and stood there awaiting the storping of the sur to alight therefrom; that instead of stopping the ear, there in sharge thereof, negligeably and carelessly sundenly started the same at a greater speed, thereby causing the car to make a suiden start or lunge and causing appelles who was using due care for the ceneral issue was filedand the trial resulted in a verdict and judgment in favor of appelles for 1400.00.

Appellant asserts as reasons why the judgment of the nount below should be reversed, that the verdict is not enablised by

the evidence and that the court erred in refusing to give certain of its instructions.

The proofs show that the appellant operates an electric car line, running through a station called Witchell, thence in a southwesterly direction through Edwardsville, continuing southward across the tracks of what is known as the Clover Leaf railroad, through and beyond the place called lecelire, lying next to or very near Idwardsville. At this point appellant's read runs along the Tray road intersecting nearly at tight angles, Jefferson road and Lincoln road which are some six hundred fest At the intersection of Jefferson roud, appell at hou a station called Leclairs and its next station is Halyoks, about 200 feet beyond Lincoln road. Appelloe got on the ear at itchell a little before 9 o'clock on the corning of July 4,1913. He testified that he informed the conductor he wanted to get off at leclaire and that the conductor said all right. This statement was denied by the conductor and at any rate the car did not stop at Jeclaire station. As the car passed the booth located at that point, appellant pressed the button, signalling his desire to have the car stop and the conductor gave a signal to the dotormen. Shortly afterwards appelled went out on the rear platform of the car, which was some five feet in one may by four the other in size. He stood on the platform some six or sight inches back from the edge of the stap with his hands in front of him. There were handholds attached to the sar on each side of him but he did not take hold of them. He claims that shile he was waiting there, the car gave a jerk and that he fluw out falling upon his head; that the car had not crossed the station before he got on the steps; that it was running "just like generally, just ordinary you know, like ordinarily, then writer while pushed me out and gave me a jerk." He also testified that the car was running along in ordinary speed all the time and after

the exidence and that the court errol in returing to give agraging of the instructions.

The proofs show that the appellant operates an electric our line, rounding through a station called withingl, Lamos in a southeestori, direction through Identile, sentiming anti--first tracks of what is known as the Clover ison ward road, through and heyond the place relief lendline, butter to or very near Edwardsville. At this roint appellant's rong runs along the Troy road intersecting nearly at tight angles, Jest barbaust his suce are delide boor alcould bas beer approfile a set in the intersection of Jefferson road, a pell mt han a station called Leclaire and its next station is Holyoke, about 200 feet beyond Lincola road. Appellee get on the car at line. ell a little before 9 o'clock on the morning of July 4,1919. ha Partin dry of being all tographyon and bearotet as inch pathines Reclaire and that the conductor seld all right, Tile eletered note for his ree out star yes as and actouched by d beined can at Legisire station. As the car passed the booth located of that point, appollant present the cutton, etgomilian ove manys -on all of large a even total the conductor may be the car even of tormun. Shortly afterwards appelled went out on the rear platform of the ear, which was some five feet in one may by four the other in size. He stood on the platform some six or sight inort in the edge of the eta with his head and inort is deep in front le site done no use ell offedentie eblodierd erow ered . . mid le him but he did not take held of theme. "Le claime time that a bile he -list fue well and that and jerk and that he there are ing upon his head; that the car had not creamed the station before he got on the steps; that it was running "just like generally, just ordinary you know, like ordinarily, then after while pushed no out and maye no a jerk." He shoo contisted that the car was running along in ordinary aped all the time and affer while got faster and also that when he fot out on the platform it was "running slover than it used to run." By his fall he received a cut on the head, an arm was broken and he was otherwise injured to some extent. De was required to give up his work for some eight weeks and expended \$15.00 for medical services.

Appellee was the only one who testified for him to the facts which he claims led up to and existed at the time of his injury. He however introduced one witness who was present on the car at the time of the injury, who gave his version of the affair but failed to corroborate appellee as to any sudden jerk of the car. That witness, Griffing, testified that he was a locomotive engineer; that he was sitting in the car near appellee and noticed him ring the bell at the intersection of Jefferson road and Troy; that appellee and there for a minute or so, then got up and walked out on the platform; that he noticed appellee as he stood there and also saw him as he hit the ground; that the car was running about ten miles an hour and that there was no jerk or lurch of the car.

On the part of appellant, the conductor testified that shortly after the car had passed Jefferson road he heard a beli and rushed up and gave a signal, but there was no slowing down of the speed of the car before appellee fell off. The motorman testified that after he crossed the Clover leaf tracks as kept speeding up and was going at fifteen miles an hour when Jefferson road was reached; that after he received the bell or signall at Jefferson and Troy road, the car never elackened up until the conductor "hollered" to his to stop, " that there was a fellow fell off the car;" that there was no jerk or lurch of the car.

Five other witnesses for annullant, massengers upon the car

while got faster and also that when he fot out on the platform it was "running slover than it used to run.". By his fall he received a cut on the head, an arm was broken and he was otherwise injured to some extent. He was required to give up his work for some eight weeks and expended \$15.00 for medical services.

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On the part of appellant, the conductor testified that shortly after the part of an algority and rushed up and gave a signal, but there was no slowing down of the mand of the car before mand of the car before mand of the car before the filter that the most suppressed the transfer that after he received the bell or signall at lefferson and Tray rand, the dar never slackened up until the conductor "hollered" to him to stop, " that there was a fellow fell off the car;" that there was a fellow fell off the car;" that there was an ejeck or lurch of the

- Five other witnesses for appellant, passengers upon the car

testified either there was no jerk or lurch of the ear or that they did not notice any.

Appellee not only failed to support the allegations of his declaration by the weight of the evidence, but the same was so manifestly and overwhelmingly against him that it would be unjust to permit the judgment based upon the verdict in his favor in this case, to stand.

One of the instructions offered by appellant and refused by the court, was as follows: "You are instructed that, although you may believe from the evidence that the defendant did not stop its car for plaintiff to alight, yet that fact does not Bustify the plaintiff in going upon the platform and as hear to the step asto be in a dangerous position while the car our running at a high rate of speed, and if you believe, mann from the evidence, that before the defendant's car begun to slacken its speed the plaintiff went upon the sold platform and near to the steps of said car while it warrunning at a high rate of raced, and that his action in so doing was negligent, and a lack of ale care for his own sefety, and that such action on his part lelped to bring about his injury, then you should find the definitet not guilty." This instruction submitto to the jury, the quetions whether appellee did certain acts at the tire of and just prior to his injury and also whether the doing of the the, if they found he did them, constituted negligance and lack of due care for his own safety. These were properly quastions of fact for the jury and if found against appellee, would entitle appellant to a verdict in its favor. o other instruction was given which covered the same points as this one and it was error for the court below to refuse it. This instruction differe very materially from the one offered by the appellant in the case of Alton Ry. Gas a liee. Co. v. lebb, 219 111.,563(Affirming 119

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Appellee not only failed to support the allegations of his declaration by the weight of the evidence, but the same was ed bluow it Jadi mid femisma ylanimistarevo bus yliterimam os were aid at tolbrev and more based thought and time of taulau or in this case, to stand.

besuler bas inclined ye becalle encircurient and to eno by the court, was as fellows: "You are instructed that, although you may believe from the evidence that the defendant that on asob test just jet, justs to alight, yet that feet does not of them me box carlining mit open auton of lithutely self without the step asto be in a dangerous position while the car was running at a high rate of speed, and if you believe, wann from the evidence, that hefore the defaudant's car begin to sheeten its speed the plaintiff went upon the end platform and seep to the been lo sing at main and servantage of a high rule of and that his action in so doing was negligent, and a lack of due care for his own safety, and that such action on his part helped to bring about his injury, then you should find the defendant not guilty." This instruction submits to the jury, the quesfaul ban le sait adt in alen nintee bib sellegge redielw anoit li .see eds to doing do whether the doing of the man. they found he did them, constituted negligence and a lack of due care for his own safety. These were properly questions of of the jury and if found egainst appelled, would entitle an ellant to a verdiet in its favor. No other instruction was -12 way it has one this as this same but beyond it was alerefile colfination to refuse it. This instruction differ very materially from the one offered by the appellant in the case of Alton My. Can & Mice. Co. v. Nebb, 219 111., 563(Affirming 115 A Alton ny.

Ill. App. 75) to which our attention has been called by appellee, where the question of a material variance between the declaration and the proof, was sought to be raised by the instruction, and the ruling of the supreme court upon the overtion there presented, in no wise effects the question arising
here.

For the reasons above indicated the judgment at inthis case will be reversed and the cause remanded.

Reversed and remanded.



(Not to be publ reported in full.)

Ill. App. 75) to which our attention has been called by appelloss, the question of a material variance between the seulartion and the proof, was sought to be raised by the intruction, and the ruling of the supreme court upon the quesion there presented, in no wise effects the question arising

For the reasons above indicated the fudgment of inthis.

Reversed and remanded.

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I A C MILLSPAUGH Clark of the Am	pellate Court, within and for the Fourth District of the
	he foregoing is a true copy of the OPINION of the said
Appellate Court in the above entitled cause of re	ecord in my office.
IN TESTIMONY WHEREOF,	I have set my hand and affixed the seal of said Court
at Mt. Vernon, this	day of May,
4 7 4044	
A. D. 1914.	2. Millspaugh.
VC-1	
	Clerk of the Appellate Court.

OPINION

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186 A591

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

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A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March of May, A. D. 1914, there was filed in the office of the OPINION in the words and figures following:	
Mattingly Jan-	ERROR TO APPEAL FROM
VS. No. 4 October Term, 1913.	Ciraint COURT
Oyara Coal C.	Dalue County

TRIAL JUDGE

Hon UV June ?



October Term, 1913.

Martin Mattingly, Administrator, etc., Appellee,

vs.

Appeal from Saline.

O'Gara Coal Company,

Appellant.)

Opinion by Highee, J.

186T.A. 501

This is a suit brought under the statute in relation to miners, by farting attingly, as administrator of the estate of James Lattingly, deceased, to recover demares for the benefit of the next of kin of the deceased, who at the time of his death, was working in a coal mine of appellant, assisting in running a cutting machine in one of the rooms of said mine. The negligence charged against appellant in the declaration, was stated in three counts. The first charged, that a dangerous condition caused by the loose rock and slate, forming a pert of the roof, existed in the room where decensed was working; that such dangerous condition was known to appellant or could have been known by a reasonably careful examination of the room; that it was the duty of appellant to cause to be placed a conspicuous mark at said place of danger, as a notice to said James attingly to keep out and that appellant failed to discharge its duties in this regard. The second count charged, in addition to the above, that appellant failed to with-hold the entrance check of deceased and the third charged common law negligence in not furnishing deceased a reasonably safe place in which to work, and that deceased was in the exercise of due care and caution for his own safety at the time of the injury. At the close of the evidence for appellee, after the court, on appellent's motion

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Cotober "ems, 1915.

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Coinion by Himbee, J.

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This is a said brought under the statute is religious fine a si sid? or well- out le trining, as administrator of the velous or allowed sale not be much reveren of because , wighthe' com will be said off an oder bessessed and to mid to tron odd to na .: . salac. . Jacifes o le onim froo a at goldrow esw . diesb running a cubling anchine in the of the mean of the sine. "In segligence charged against ampliant in the dealerstion. ... stated in three nounts. The first sharpen, that a doug error or noff to Jane a patern, sinis has user seed out ye became noit! down in it is the room where deer need were in his basks . too m so even blue a to far il were of mucha and acidihaco aucregrab knows by a reasonably careful exami maken of the reason was the duty of appellant to couse to be rised a very curing or k at said place of danger, as a notice to said be a filter in and the state of In this regard. The second count charged, in addition to the an leve, that agreefing the biful-bill the companie that await the tent and the third conveyed common low no. I hence in not in ain. . There of dates it was a street of the control of The telegon but wree self to selected out of any becoosed fault his own andety at the time of the anjur. At the elece : the ce for appeller diter the court, on appellant's action had refused to give peremptory instructions in its favor, appellant requested the court to instruct the jury to return a verdict in favor of appellae for the nominal amount of one dollar damages which was denied. Appellant thereupon introduced evidence in its behalf and at the conclusion of the trial, the jury found in favor of appellee, fixing the amount of dranges at \$750.00, for which amount judgment was entered.

Appellant insists here that the two principal witnesses for appellee, were so immeached by groof of previous controlletory statements made by them, that the verdict should not be permitted to stand, also that the court erred in its rulings on the evidence in regard to the damages and in the matter of instructions.

The proofs show that on August 3, 1911, James Mattingly was working in appellant's coal mine and at eight o'clock that morning was assisting jeter Amberger in running a machine enumped in cutting coal. The room in which they were at work was about thirty feet wide and by nine o'clock they had cut eight runs and were nearly across the room. It was the duty of Untimaly to shovel out of the way the "bug dust", as the fine coal thrown out by the drills of the machines was called by the miners. Thile so engaged he stooped over to fix a skid for the _ dhine to move on, when suddenly a large piece of slate fell on him, injuring him so that death resulted. There was no contaction but that Mattingly received his entrance check and that there was no denger mark at the place where we was injured, but the question is raised as to shether the roof at the place of the injury was in a dangerous condition as charged, and whether this condition could have been ascertained by a reasonably careful examination on the part of appellant ande at the usual time required by law.

Amberger, the machine runner, with show lattingly orsel,

had refused to give peremptory instructions in its favor, oppellant requested the court to instruct the jury to return a verdict in favor of appelles for the nominal amount of one dollar damages which was denied. Appellant thereupon introduced evidence in its behalf and at the conclusion of the trial, the jury found in favor of appelles, fixing the amount of damage.

Appellant insists here that the two principal witnesses for appellee, were so impeached by proof of previous contradictory statements made by them, that the vertict should not be printed to stand, also that the court erred in its rulings on the evidence in regard to the damages and in the motter of in-

The proofs show that on August 3, 1911, James Fattingly was -area fait dools's eight at mine and at eight a'clock that merry ing was assisting Feter Amberger in running a machine encoused in read and in the cost of the cost of the cost of the cost thirty feet wide and by mine o'clock they had out eight runn and ears nearly acress the rose Pl . see the date of lattingly to shovel out of the way the "bug dust", as the fine coal throm out by the drills of the machines was called by the minere. wille so managed in etcoped over to fix a sind for the section to move on, when suddenly a large piece of slate fell on him, injuring him so that death resulted. There was no contention but that Mattingly received his entrance check and that there out fud .termint was ed erede shape statin regulared, but the question is raised as to whether the roof at the place of 'he injury was in a dangerous condition as charged, and whether this condition could have been esceptained by a reasonably enterpois loves and in whom incleage to Jang out no noiseminers ful required by law.

Amberger, the machine remner, with them inthingly tested;

and a miner nexed Bird, testified to facts, showing that the condition of the roof was dangerous and that its appearance was such that the danger should have been discovered and norked by the nine examiner and this proof was not overcome by the evidence introduced by appellant. The effect of this proof was sought to be overcome by appellant, however, by showing that these witnesses had made statements before the coroner, then the death of attingly was being investigated, which were in a number of respects, contradictory to the statement and by them on the trial of this cause. Amberger, however, denied that he made the statements attributed to him before the coroner and Bird, while admitting a part of the statements claimed to have been there made by him, attempted to emplain the controlletory features. hile the testimony of there witnesses who so while unentiefactory and subject to criticism, yet it not for the jury who saw them on the witness stand and heard them testify, to determine what credit should be given to their testinony and the evidence upon the whole case was sufficient to warrant a verdict in favor of appellee.

Appellant further contends that the proofs show deceased had never been a regular voluntary contributor to the support of any one connected with him and that no more than nominal demages should in any event have been allowed by the jury in this case. The proof however shows that he contributed to the support of both his father and his nother and this as sufficient to sustain the verdict. Appellant complaint that evidence was admitted relating to the pecuniary condition or antity in perform manual labor of certain of deceased's new of the life this evidence nowever was afterwards withdrawn by a pellet and the jury were instructed by the court not to consider the same.

That no harm was done and the jury obeyed this instruction, is

and a views manual Strat, the Little is green, where the tint time condition of the roof was dangerous and that its approximate was such that the danger should have been discovered and marked by the mine examiner and this proof was not overcome by the evidence introduced by appullant. The effect of this proof was switch? To be everyone by appellance, heavest, by security tink three witnesses had made statements before the coroner, when a ax one state of the property was not appeared in country and number of respects, contradictory to the statements unde by them on the trial of this cause: Amberger, however, denied tiet ! !. made the statements attributed to him before the coroner and Bird, while admitting a part of the statements claimed to heve low Wor made by him, attempted to emplain the contradictory Contacts, wills the beelings of their values at the TANY of Any see of the minimized and define of Any of the Kanada who see them out the outposes steed out tents that the day onlytermine what credit should be given to their testiment the evidence wown the whole class was sufficient to ware at a vector in the deptition of the second

Appellant further contends that the proofs mow deceased of any one connected with him and that no move than newland densages should in any event have been allowed by the jury in this case. The proof however shows that he centributed to the support of both his father and his mether and this was sufficient to sustain the verdict. Spellant comfaint that evidence and admitted relating to the pecuniary condition or ability to acres form moment labor of certain of deceased's next of his. All this form moment labor of certain of deceased's next of his. All this jury were instructed by the court not to consider the two.

That no barm was done and the jury obeyed this instruction. It

akama shown by the small amount given to appelled by the verdict in this case.

Linetwen instructions were given for a pellec and twenty two for appellant which appear to have stated the law amplicable
to the case, correctly and to have fully covered every phase of
the same. Thile a number of instructions offered by appellant,
were refused, yet those which appear to have stated correct
principles of law applicable to the case, were fully covered
by instructions given by the court for appellant.

The judgment in this case should be and is affirmed.

Affirmed.

72, 72, 94

(Not to be reported in full.)

minima shown by the small emount given to appelled by the verdate in this case.

to the case, correctly and to have fully covered every phase of the same. This enumber of instructions effered by annellant, were ruled by annellant, principles of law applicable to the case, were fully covered by annellant.

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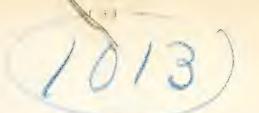
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(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this Standard day of May,
A. D. 1914. A. C. Millspaugh
Clerk of the Appellate Court.

OPINION

No A Cod



Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present.

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

And afterwards in Vacation, after said March of May, A. D. 1914, there was filed in the office of the OPINION in the words and figures following:	
Duit	ERROR TO APPEAL FROM
vs.	Circuit COURT
October Term, 1913.	Drauklin COUNTY
Atilley.	

TRIALJUDGE



October Term, 1913.

Jesse R. Smith,

Appellee,

vs.

Appeal from Franklin.

C. W. Stilley,

Appellant.)

786 I.A. 602

Opinion by Higbee, J.

Appelles brought this suit in assumpsit to recover \$221.40 which he claims appellant agreed to pay him to reindures him for money he had maid out in persecting the title to current lands in Franklin County, Illinois. The jury returned a vertice against appellant for 110.70, just one helf of the mount and for and judgment having been entered for that arount, appellant hasbrought the case here that the resord may be reviewed. There is no substantial contradiction in the evidence except upon the one question whether appellant agreed to make a pull the amount of \$221.40 for the mency paid out by him in persecting earld title, and the only reason urged by appellant, why the judgment in this case should be reversed, is that the verticit me not sustained by the proofs and in that connection, it is further claimed that the amount fixed by the jury shows that the verticit was a compromise, for which there was an foundation in the facts.

The evidence as to the facts in this case, with which we have to do, is as follows: In October, 1914, Jesse H. Smith, appellee, purshased the coal, gas and oil underlying 175 acres of land in Irankful township and forty acres in the same thin in Franklin County. At that time appellant C. W. Stilley, was engaged in the same options for such rights in a large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in that vicinity, and shortly increasing appellace of the large block of land in the large block of land in that vicinity, and shortly increasing appellace of land in the large block of land in the land in the land in the land in the land

Cotober Terms, 1921.

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Appelles,

C. T. Ottler,

Angellast.

Appeal from Pranklin.

186 I.A. 602

Opinion by highen, J.

Appelloe brought thin soit in seconstit to recover 1.1.46 which he claims appellent agreed to pay him to reinhurse i.i. far and the unit of and the unit of the unit of the interest of the interest of the interest of the interest of the unit of the unit of the for and judgment having been entered for that amount, appellant hasbrought the case here that the record may be reviewed. There is no substantial contradiction in the evidence except upon the one question whether appellant agreed to pay appelles the amount of \$221.40 for the money paid out by him in perfecting said title, and the only reason urged by appellant, why the judgment in this one that the smount fixed by the jury shows that the spoofs and in that someeties, it is tarther claimed that the amount fixed by the jury shows that the vertict was a compromise, for which there was no foundation in the facts.

The evidence as to the facts in this case, with which have to do, is as follows: In Cotober, 1918, Jessen. Inith, appellee, purchased the coal, gas and oil enderlychn 175 acros of land in brankful township and forty acres is Care township in Franklin County. At that time appellent S. . "tilley, were uncreased in that vicinity, and shortly theresiter appelles give him

an option on the 11b acres of mineral rights so surchased by him. The written ortion was deted Movember 5, 1011, and ran for three months. The purchase price provided for therein was 35.00 am acre, and by it appelles agreed that in case of sale as ould furnish an abstract of title showing good title in him . free and clear of all encumbrances. On January 26, 1017, aspullent. wrote to appelled that he had sold the land to one are. A. Phese. Subsequently, in January, 1919, it ampeared that the walk to Busse was abandoned because a prospect hale drilled by his engineer did not turn out satisfactorily. At the emiration of the ortion it was extended on the same terms for five applies longer. In April, 1917, annually traded the 175 acres in rookfort township, to Jesse Dimmond and . D. Firkpotrick, for some property in Denton, Illinois, subject to the option held by anpellant, and before the dard was made he interest monething what he had done. Appallant expressed regret and told his the option on the block of land, was being taken up at a price of 35.00 on acre in the name of D. V. Buelanan. Thortly afterwards appelled delivered a deed to Dimond and Kirkon trick and community his trade with them and as soon as it was occaleted be outered into an agreement with them, to buy the 176 agree back at 31. I am acre cash. Utill later, after convergation with appelliant, appelice made a dued of all the land to Duchman at 10.00 au acre, 100.00 being paid in case by appellant sue the deed put in escrow in a bank. when appailant as propering to turn the land over to Buchanan, it was found there was no sufficient abstract and that proceedings were necessary to quiet the title. Thereupon the title was persected and a satisfactory abstract obtained at the cost of 1201.40, which amount was paid by appellee. Afterwards appelled demunded that this mount be required to him by

an option on the "15 acres of mineral rights oc unrobased by him. The written option was dated November 9, 1911, and run Ter three months. The purchase wrice provided for therein was 135.00 am bises of also to ease at fast beerga selled it by and age. sort , will ni sittle amount and the fortest an altitute and clear of all encumbrances. On January R6, 1917, separant manufactor and new Year Land that have been a freet to recommend Supsequently, in January, 1912, it empared that the nele to Busse was abandened because a promped ballta is his en-To arideriume out JA .viitodonTelias duo atut don bib toomia the option it was extended on the same terms for five worther longer. In April, 1912, appelled traded the 175 seres in irongfort township, to Jesse Diamond and L. D. Mirkpatrick, for some or well in Benton, Illinois, subject to the oution held by supallant, and before the deed was made he informed ampellant what he had done. Appellant expressed regret and told him the option on the block of land, was bring taken up at a price of \$30.00 am acre in the name of D. W. Buchenan. Chartly afterwards appelled aid believered a deed to Dimond and Kirkwatrick and consumed at the believered cini bereine od befelomos asw ii es noos as ban medi diiv ebari an agreement with them, to buy the 175 agree back at 11. 0 am acre cash. Still later, after conversation with appellant, appe no 00.08) is namedout of bund and the to book a show collect acre. \$100.00 being paid in cash by appellant and the deci out in escrow in a bank. When appellant was preparing to turn the land Jacks of the control of the same state of the same of and that proceedings were necessary to quiet the title. Derehomistdo tomitada yrotesīvijas a bas betselves sampeljit edt negu at the cost of \$221.40, which amount was paid by supeller. Afterrd wid of handler ad furence side ford behavely believes abraw

appellant who he claims had promised to pay it. Appellant refused and denied any promise or liability in the matter and this this suit followed.

There was no direct evidence as to the terms of the claimed agreement, except that of appullant and appelles, though there were certain facts and circumstances shows by the proof bearing upon it. Appelled testified that then he informed appelled be had traded off the 175 acres tract, appellant said it made a gap in his block of land and asked him if he could not get out of the trade; that he told appellant he could not get out of the trade but that maybe he could get the parties to sell it back to him and appellant asked him to do so; that after he got the land back he told appellent he would have to have 31.00 or \$35. an acre for it if he was to get up the title and appellant said "if you will so shead for we he will see you do not lose saything"; and that thereafter when the mass question was raised by appelles, appellant said he would take care of nin; that finally when the check was given by appelled to may for the costs of perfecting the title and abstract, appellant said to him, "You give me a check for the advance fees to may the little and costs and I will give you a check as soon as I get back to Benton"; that he, sppellee, gave \$30.00 an acre cash to get the land back.

Appellant denied the conversations testified to by any line so far as they related to any so ise or understand to repay the costs discharged by him, but stated that any the land that any the his office and said he had bought the land back and the most to turn it over at 130.00 an acre; that men the question of ming a good abstract came up, he told appelles the loss in regard to the same would be his, appelles's, and that he would have to have the new abstracts made; that he never did agree to reimburse appelles for the costs of fixing up the title.

appellant who he claims had promised to pay it. Appellant refused and denied any promise or liability in the metter and firs

bemisle alt le serret alt of as somehive foorib on sew erad? equals equals , suffect bus toallages to fadd foests , increases were certain facts and circumstances shown by the proof learing and the flage togethind that when he informed application of the a squared out the 126 correct, possible of the tabulation for to ten blace of it and beste but had to speld eid at way sait to tue jen you blues so inclience blot an indi about all le word it fire of meitre out too blues on sayum tout bud abays of the sale appears asked its do do of the base salloger been in of .ET! we (C. At. synd of eved bluew ad facilings blot ad shed busi hise Justiague has allie the up to get up to the telle and appear as "Tryou will no aboad for me I will see you do not lose acythica": and that thereafter when the same question was raised by accorder, any nada glinail fult ; mid to erro edat bluow ed hice fuelleque quitosirs: lo ataco suft tot yea of sallengs yet mayin any deeds s as evis and abetract, and as biss said and state off Hrw I have steen but ality all you of seek and and rol rol decin give you a check as a con as I get back to Bentus"; that he, opnelles, save 33.00 an acre cash to get the lend back.

in Appellant denied the conversations testified to by equalities to by equality so far as they related to any proutes or underweet to the costs discharged by bim, but sisted that supellee cone to his office and said he had bengit the land had and one ready to turn it over at 130, on an acre; that when the question of making a good abetract case up, he told speciles the loss in repara to be same would be his; appellee's, and that as would have to have the new abstracts made; that he never did spec to rein-burse appellee for the costs of fixing up the title.

The circumstances proven and relied upon by the parties for sustaining their respective claims, as to the true facts concering the agreement or want of agreement between them, do not appear to be conclusive on the one side or the other and are not necessary to be set forth here. The evidence in the case is conflicting and cannot be reconciled upon the main question is insue and we are of opinion that the members of the jury who saw the parties upon the mitness stand and her at them best my sure, and der all the circumstances of this case, best qualified to judge where the truth lay and that their verdict as to the rights of the parties should prevail.

Appellant, however, contends, that the judgment should be reversed and the cause remanded for the reason that the amount of the verdict is not consistent with any view of the law or the evidence in the case: that the claim of appellee was for \$221.40 and the proof showed he was entitled to recover that amount if anything, but that the jury evidently split the difference and found a compression verdict in sever of appelled for annual for his claim, thereby acquitting appellant of the burden of any lagthe other half. Appellant cites several cases where judgments based on compromise verdicts have been reversed for that reason. In examination of there cases, however, will disclose that they were reversed at the instance of the plaintiffs there is, because they had recovered less than they were antitled to. The same reasoning however would not appear to apply to a case like this, where appellant socks to take advantage of the failure of the jury to give a larger verdict against his. This question has recently been before this court in the case of Jones v. Mates, 179 111. App., 576, and we there held that a contention a line to that made by appellant here, could not proveil under the well established rules of law and that a defendant could not be heard

The electurationes proven and relied upon by the perties for anataining their respective claims, as to the true facts concering the agreement or want of agreement between them, do not appear to be conclusive on the one side or the other and are not necessary to be set forth here. The evidence in the case is conflicting and cannot be reconciled upon the main question in issue and we are of opinion that the numbers of the jury who are the parties upon the witness stand and here them testify, were, under all the circumstances of this case, best qualitied to judge where the truth lay and that their verdict on to the rights

Appellant, however, contende, that the judgment so mid be fourte and that the cause remanded for the reverse that the payore add to well aid be welly you altiw imedicance for al felbray and lo evidence in the case; that the claim of ampellee was for 1221.40 li finance Just revenes of helitine new on bewede look out bes anything, but that the jury evidently split the distorence and is livi-one not colleges to rever at setbrev esimerques a banch his claim, thereby sequitting appellant of the burden of reging the other half. Appellant cites several cares where judgments based on compremise verdicts have been reversed for that reason. An examination of these cases, however, will disclose that they were reversed at the instance of the plaintiffs therein, because omne odl. ... ah helfifne erew yeds medt seel hereveer bed yeds reasoning however would not appear to apply to a case like this, ad to exacted and to exercise what of adeas fundleggs exercise jury to give a larger verdict against him. This question bes recently been before this court in the case of Jones v. Betes, 179 Ill. App., 578, and we there held that a contention sicilar that sait robon lievers for bluos, each inclinger ud about that of brasa at for blues inshested a fait bus wal to solur bedeildates

to object because the amount allowed the plaintiff was lear than the evidence showed was due him; that the plaintiff alone in such a case is entitled to complain of the smallness of the verdict. (See also Reyman v. Reyman, 210 Ill., 524. Reid v. Rouston, 20 Ill. App., 48. Starks v. Schlensky, 128 id. L.)

We find no substantial reason for reversing the judgment of the court below and it will accordingly be affirmed.

Judgment affirmed.

(Not to be reported in full.)

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OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

of May, A. D. 1914, there was filed in the office of the OPINION in the words and figures following:	term, to-wit: On the day c Clerk of said Court at Mt. Vernon, Illinois, an
Buckley, doing	ERROR TO APPEAL FROM
busius (fri	186 I.A. 603
vs.	Circuit COURT
October Term, 1913.	Marion COUNTY
Robertson	

TRIALJUDGE

Hon Shor M. July



October Term, 1913.

B.E.Buckley, doing business as Colonial Kercantile Agency, Appellee,

VS.

Appeal from Earion.

R. H. Robertson,

Appellant.

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Opinion by Higbee, J.

This was a suit on a note for \$50.00 payable to the Colonial Dercantile Agency and signed by 4. N. Nobertson, the oppellant.

At the conclusion of all the evidence, the court, at appellee's request, instructed the jury to return a verdict in favor of appellee for the principal of the note, hich are done and judgment entered against appellant for that amount. The case was originally commenced before a justice of the peace, at there were no written pleadings on the trial. Appellant relied on failure of consideration for the note as a defense, and also complains that the court erredingiving appell o's peremptory instruction and in refusing proper evidence which was offered to shaw want of consideration.

The facts as they appear from the evidence on the trial reas follows: On December 15, 1911, and prior there-to, B. B. Buckley was engaged in the law and collection business in t. Louis, lissouri, conducting the early under the name of the rolpnial Vercentile Agency. At the same time appellant was engaged in the Tailoring and "Cents turnishing Goods" business at Centralia, Illinois. On that day the representative of appellant, called on appellant and procurred from him the note one. In return there was delivered to appellant by said representative of

Cotober Term, 1913.

B.R.Buckley, doing business as Colonial Tercantile Agency, Appellee,

vs.

Appeal from . urion.

R. H. Robertson,

Appellant.

POR ATAUF

OR OTHER DESIGNATION.

Opinion by Higbee, J.

This was a suit on a note for 150.00 payable to the Colonial Mercantile Agency and signed by P. H. Robertson, the epopularit.

At the conclusion of all the evidence, the court, at anpellee's request, instructed the jury to return a verdict in favor of appellee for the principal of the note, which was done and judgment entered against appelless for the mount. The owners originally commenced before a justice of the pince, so there were no written pleadings on the trial. Appellant relied on failure of consideration for the note of determine, and although including proper evidence which was offered to show want of consideration.

The facts as they appear from the evidence on the (risl are as follows: On December 15, 1911, and prior there-to, b. b.

Buckley was engaged in the law and collection business in Tt.

Louis, Missouri, conducting the same under the name of the Colonial Mercantile Agency. At the same time appellant was engaged in the Tailoring and "Gento Furnishing Coods" business at Centain the Tailoring and "Gento Furnishing Coods" business at Centainalia, Illinois. On that day the representative of acpelles, called on appellant and procurred from him the note sued on. In return there was delivered to appellant by said representative of return there was delivered to appellant by said representative of

appellant was entitled for three years to share in the benefits and privileges of the Colonial Tercantile Agency; that enid Agency would prosecute all claims listed with it under the terms of the contract; that appellant should have free legal advice on all business matters submitted by him to the Agency's legal department; that ten per cent would be charged on all collections except on claims not over 90 days old on which three per cent would be charged; that the agency would collect 200.00 for appellant within the time and under the terms specified in the contract or refund the full \$50.00 retainer fee; that the Agency should have the right to cancel said contract and refund the retainer fee and surrender claims of appellee at any time after eight months; that appellant should send at least a partial list of the claims to the home office within thirty days.

In support of his contention that there was a failure of consideration for the note, appellant offered to testify that at the time the contract in question was taken the represent tive of plaintiff stated to him, that the company had the ability to and would collect desperate claims that could not be collected in the ordinary manner and method and that such was a part of the plan and purpose of the organization, but the court surtained an objection thereto made by appellee and this ruling is claimed by appellant to have been in error. There was no error in rejecting this testimony for even if it were otherwise competent, the offer did not contain a proposal to show that the represent tions were false and if they were not false, they would not tend to show any failure of consideration. Appellant also contends that the court erred in refusing to per it him to testify that when the contract was entered into the representative of appellee stated that the Colonial Derenatile Agency was a company or a corporation with a large number of branches and that it had facili-

appalles a sertificate aboving that in consideration of 50.00, appealing was emittled for three years to obmrs in the templite and privileges of the Colonial Mercantile Agency; that anis Agency would promounte all claims listed with it under the tarms of the contract; that appellant should have free logal advice se all business satters submitted by aim at the Agency's lought department; that ten per cent would be charged on all collections except on claims not over 90 days old on which three nex cent would be charged; that the agency would collect \$200.00. for appellant wishin the time and under the terms assertied in and lady can't reminder 00.006 (int and bunish to sentings and Agency whould have the right to engree and owere the young the retainer fee and surrender claims of appoiled at any class -lan a third to back blunds tanilising the taniland sight talla anyth visiat manufacture and to the the manufacture and to dell Lake to equiet a new eredt tedt nottention bid to treque al consideration for the note, appellant offered to touth the the time the sortrast in question was taken the rear-ment then of plotskiff at tadto him, that the sampady had the shilly a and would collect desperate claims that pould not be ealisaned to frag a sum doue fadt bas bodfon bas ronnen granibro edf at its plas and purpass of the organisation, but has court such inter an objection thereto made by appellee and this ruling is claimed by appellant to have been in error. There was no error in rejecting this testimony for even if it were otherwise competent, and all and did not decrease a propose a to a test to the real the ten bluew yould , ealer ton eren yould he ealer eren, enough not tend to show any failure of consideration. Appellant also contends that the court erred in refueing to permit him to testify that when the santract was external into the representative of appellan stated that the Colonial Mercantile Agency was a company or a corportition with a large number of branches and that it had facilities for collecting claims in every state and town and that the representative gave the names of several prominent men as members of the company. This offer also failed to contain a proposeal to show that these representations were false.

In the progress of the case the court sustained an objection to this question asked appellant by counse-1, "Now as far as you have been able to ascertain, did this commany have any representative in Centralia, Illinois, until they brought this suit on a note against you?" The proposal of appellant upon this question was to show that the agent had said that the company "had facilities for collecting claims in every city and town" and this could readily be true whether the consumy had a representative in Centralia at the time or not. The fact that the representative may have claimed that there were a number of prominent men connected with the company them it was a fact that the business was sweed by appellee Buckley alone, could not have been of sufficient importance to constitute a failure of consideration for the contract. It further appeared that while appellant had sent a list of claims to appelled for collection, that none of them had been collected through his efforts, but the addresses of some of appellant's debtors were not given in the list and as the contract is still in force and no time was fixed in it within which collections should be made, there have been no breach of the Contract yet in that respect. In appellee should fail to carry out his contract, appellant had his remedy at law for a breach of the same, but such a breach of the contract cannot at this time be set up as a failure a consideration for the note.

Appellent also assigned as error that the court admitted the note in evidence when it had been indorsed by appelles to a bank and by that bank to another and, these inderse ents not

ties for collecting claims in every state and torm and that the representative gave the names of several prominent men as mendore of the company. This offer also failed to contain a propos-

- seide no isentataus truce ede the court sustained on objectal vs wail" . I. senues yd trallagas baden noitesup aldt of noit as you have been able to ascertain, did this company laive any representative in Contrails, Illinois, until they avenue then set to a note against you?" The proposes of another this question was to show that the agent had been distinct one pany "had facilities for collecting claims in every city and a had vasques and tentent out to read all the case and the case period ontwitted in Controlle at the time or unt. The fact that the temperature may have classed they have a number of ing land a set it are taken o ad dit beloomen not intained the business was owned by appelles Buckley alone, could not to equilibra shuftlanes at sensitional lawisting to need even entralieration for the contract. It further appeared that eather all appellant Lad sent a list of chine to apputles for sell-cition, that home of them had been sollested through his effects, but the addresses of some of appellant's debies were not given in age sait on has ester at flite at jorthoo odd an had tail add fixed in it within which collections should be made, there has been no breach of the Contract yet in that respect. If appelled andta I il to asing and his content, against had an content at law for a breach of the same but such a breach of the connoirer canco to equision as qui jos ed said stat ta formas fort for the note.

Appellant also assigned as error that the court admitted the note in syidence when it had been indorsed by appellee to a bank and by that bank to another and, those indorsements not

having been erased when the note was presented in evidence, it did not appear that appellee was the owner of the same. When the note was offered in evidence by appellee, it was not objected to for the reason above stated but counsel for appellant in objecting to its introduction said, "The note is not made payable to the Colonial Mercantile Agency or order and from the testimony of the witness on the stand, the note is claimed by a man named Suckley who is not maned as the payer and the note is not made mayable to the Colonial ereantile agency or bearer."

It is a general rule of law that objections on a trial to a paper or other evidence must be specifically mainted out so that they may be obviated if possible. Clauser v. Stone, 29 III., III. It is evident that had the objection here made is been pointed out when the note was introduced it could readily have been remedied. It also appears from the proof that iden appellee attempted to prove ownership of the note, ownellant objected to such proof and the court sustained the objection.

Appellee was in possession of the note in question and under the above circumstances, appellant was in no position to take advantage of the failure of the former to prove that he was in fact the owner of the same.

The judgment of the court below will be affirmed.

Affirmed.

(N ot to be reported in full.)

having been erased when the note was presented in evidence, it discreted to return the note was offered in evidence by appeller, it was not abjected to for the reason above stated but counsel for appellant in chart, to it introduction to the festimony of the witness on the stand, the note is claimed to the made payable to the "olonial eresutile sency or bearer."

It is a general rule of law that objections on a trial to a pay of that they may be obviated if possible. Clauser v. Tione, so that they may be obviated if possible. Clauser v. Tione, 29 il., ii. it sould not may be not so the note may introduce it can be not so the note may introduce it at when have been remedied. It also appears from the proof that when appears are not the court contains to the objected to the note in quantities was in nonementar of the note in quantities to take advantage of the court or no position to take advantage of the court or the court of the c

The judgment of the court below will be affirmed.

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CONTRACTOR

(N ot to be reported in full.)

the transfer of the Date of the Contract of

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth Distr	
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of	the said
Appellate Court in the above entitled cause of record in my office.	
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of se	aid Court
at Mt. Vernon, this / St day	of May.
at the verton, this f	, -,
A. D. 1914. a. C. Millebaugt	
Clerk of the Appellate Court.	
otom of the representation	

OPINION

186 PG 9

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

And afterwards in Vacation, after said March term, to-wit: On the

Present:

Hon. Harry Highee. Presiding Justice.

Hon. James C. McBride, Justice.

Hon. Thos. M. Harris, Justice.

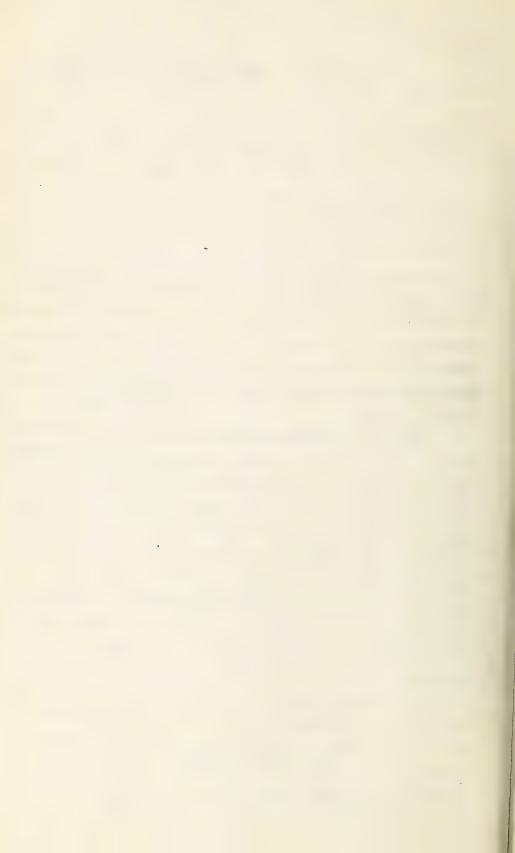
A. C. MILLSPAUGH, Clerk.

W. S. PAYNE, Sheriff.

of May, A. D. 1914, there was filed in the office of the OPINION in the words and figures following: .	e Clerk of said Court at Mt. Vernon, Illinois, an
Illinoid W. Hess, by B.F. Kagy, her conservator	ERROR-TO APPEAL FROM
	186 I.A. 609
vs.	Circuit COURT
October Term, 1913.	Fayette COUNTY
Lriffith	

TRIALJUDGE

Hon J. C. Mc Bride



October Werm, 1913.

Illinoi W. Hess, by B. F. Hagy her conservator,

Appellee,

VE.

Appeal from Payette.

Harvin J. Griffith, Appellant.

186 I.A. 609

O pinion by Highee, J.

This is an appeal from an order entered upon the hearing of objections, filed to the final report of Carvin . . I riffith, as conservatir of Illinoi . Mess, an income person. The hearing was had in the circuit court of Jayette County, where the case had been transferred from the county court, by agreement of the parties.

The following facts were found in the order appealed from: Marvin J. Griffith was appointed conservator of Illinoi ... Hees August 8, 1904, she having been duly adjudged to be an insane person. Illinoi . hess was afterwards duly adjudged restored to reason and the censervator filed his final report as such, on July 1, 1912, having acted as conservator from his appointment to that date. I he filed objections to said final report and to all other reports made by her said conservator, objecting among other things, to the amounts shown to have been paid to attornes, to the amount of interest shown by the reporte to have been received and to the amount retained by him for his compensation which she alleges was not just and reasonable. The court found in the order that a just and reasonable econemention to the conservator, for his services was 750.00, an amount equal. to 100.00 a menth, for the first 7 menths of his conservatorship, and an amount equal to 200.00 a south for the balance of the time, making a total of [18, 350.00 for his services for

debiler fame, Little.

AND ALL OF THE PARTY STREET, NAME AND ADDRESS OF

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ANTHUR WITH SWARP

ACTIVITIES A STREET

1861.A. 609

R plaint by Halber, Jr.

This is an equal from an order entered when the hearing of Persons, filed to the final report of Persons. In wifith, come reason. The hours is had in the circuit cent of Tayatte County, where the bad hear transferred from the county count, by agreement the parties.

The following fucts were tought at the extent principle affile . Griffith was arredated concernation if there . Ness t 8, 1994, she having been duly adjudged to be an term: erson. Illinoi I. Here was afterwards hely adjunged vertered when an its or i nit aid bailt relayees and in a measur ba - July 1, 1912, having acted as conversion from his my calmione of Leaf date of agelsonies belie as 2 . mish fads of I and to all other recents ands to her and sommervator, elipsein, emong office things, to the emoughs on an on laye have raid to atternes, to the aromat of interest pieces of us the reports to live - read to this to the land to be district Japanes and and has beginned IT was a good and the sent ton some angelf one delie meldee o' uniforma was afarmenso had best a feel rabos and hi somel the engesystem, for his nervices were "Nic. "", as with a proto through a marking for the first Vi analis of his ecurerwithraspirit and the state of 20,000 of lamps duners on her edite Told services als tol 00.000, at to face, a marker , will be

seven years and eleven months. The court further found that
the conservator had received interest at the rate of six per
cent per annum on the funds of said estate during said period,
and had only accounted for three per cent in his reports, retaining the balance, amounting to \$30,907.39 as compensation;
that deducting the amount found to be reasonable compensation
as above stated from the amount retained by him, there was a
balance of \$12,657.30 in the hands of the sonservator not accounted for by him; that there was no evidence that the amount
paid out by him for attorneys fees, was unreasonable; that the
allowed or attained by said conservator folia compensation,
objection to each report as to the compensation, was sustained
and it was ordered that appellant pay to Illinoi 1. Heas said
sum of \$12,657,39 with five per cent interest thereon from the
18th day of February, 1913. From the order so entered this
appeal was taken by said conservator, Marvin J. Griffith.

C ross errors were filed by appellee but he does not ask that they be considered unless the order in this case is reversed on the errors assigned by appellant, so the question now presented for our consideration, is did the court below err in entering an order requiring appellant, to account for and pay to appellee \$12,657.39 retained by him from the interest collected on the estate of his ward.

The proofs show substantially the following state of facts:

Illinoi w. hose and her mother, Wrs. Harnett, in the spring of

1904 and prior thereto, lived together in S helby county, Illimois, and were possessed of a large amount of personal property
and real estate. The mother died intestate in that year and

Proc. hose, who was her only heir at law, was appointed administratrix of her estate and shortly afterwards moved to Brownstown,

Fayette county, Illinois, where appellant, who was related to
her by marriage, lived and carried an a general store in conmection with two partners. Appelles turned over all her own

notes and those of the estate of her mother, about 1135,000.00

seven years and wleven months. The court further huse ren wie to star out to describe bevieser bad reteyreemes out helres blae gairub etafee blae to chaut out no muna res face er alread only ascounted for three per cent in his reports, er taining the balance, emounting to [30,907.39 as compensation; mailtoneques aldanamen as es bauch tous suit substantion se am event iski will be ister income the interest and a story of the second as balance of \$1,600.50 in the mande of the consequence counted for by him; that there was no evidence that the cuernt paid sot by the for attorneys from wes misconnicts; that his allowed or stained by said conservator for his compensation, bies easil . . toniill of you fuellaggs fadf barabre one it has aun of \$12,657.39 with five per cent interest thereon from the inth day of rebruary, 1915. From the neder so unineed this oppeal was taken by said concernater, Marrin J. Oriffith.

C ross errors were filed by appelled but he does not ask that they be considered unless the ender in this case is reversed on the errors assigned by appellant, so the question now presented for our consideration, is did the court below err in entering an order requiring appellant, to account for sad pay to appelles \$12,657.39 retained by him from the interest cellected on the estate of his ward.

Illinoi W. Rose and her mether, i.ro. Marnett, in the spring of 1904 and prior thereto, lived together in 3 helby county, Illinois, and were possessed of a large amount of personal property and real setate. The mother died intestate in that year and fra. Fees, who was her only helr at law, was appointed administration for setate and shortly afterwards moved to brownstown. Eayette county, Illinois, where appellent, who was related to her by marriage, lived and couried on a general store in connection with two partners. Appellas turned over all mas own notes and those of the ostate of her mother, about 1120,000.00

in all, to supellant, to sanage for her, About this time the Board of Meview of W helby county, caused proceedings to be instituted to collect back taxes from Wrs. Hess personally and from the estate of her nother, brs. Marnett, claiming mearly \$5,000.00. Appellee, who was not in good physical health, became nervous and depressed and about July 7, 1964, was taken to a sanitarium at Jacksonville. Appellant visited her there and was told by the superintendent that it would be necessary to have an order of court adjudging her invane, if he should retain her in that institution. Appellant thereupon, upon consultation with his attorney, caused an inquest to be hald in the county court of Morgan county where she was adjudged insame. Thereafter Judge Trumon L. Ames was appointed administrator de bonis non of the estate of Fre. Martnett and aspellant appointed conservator of appelles. Appellant turned over the notes belonging to the estate to Judge's Ames, amounting to some \$99,000.00 and retained those belonging to his ward, amounting to about 37,000.00. Judge thes afterwards settled the tax suit for some 12300.00 and at the conclusion of the administration, in March, 1905, turned the notes back to appoil ant, so that at that time the estate of Mrs. Hese in the hands of appellant, consisting of notes and mortgages, arounted to about 3137,000.00. He also had charge of certain real setate belonging to her consisting of 160 acres of land in Payette County, a brick and frame store building in Effingham, a poultry house at Shelbyville, a dwelling house at Tower Hill and some vacant lots in Shelbyville and Colorago. H ubsequently some real satists was taken in settle ent of mortgages and converted into canh by appellant. Appellant made a number of trips to look after the Illinois real estate and also made some repairs and improvements on some of it. Fry. Heas returned from Jacksonville in June, 1905, and resided for some two years and three months with r. G-riffith at Brownstown, removing after EEE that to Liftingham.

in all, to appellant, to menage for her. About this time the not of speciments become approve palled it is entired to freed has allowered erei and work early food tooling of builditent from the entate of her mother, tre, Harnett, elaboring nerely \$5,000.00. Appalles, who was not in good physical health, bemaint not , 1986 of the Anna has been been account and to a conttarium at Jacksonsville, Appellant visited ber thus and was told by the augestabelent that it smilt be morehe have an author of court adjudging on human if he should were to the last the last the local book to make the nemeral rates and the same of the same of the same of the same of the same in the court, court of Peages needly where the use untulest has sers. Derestier Julge Tymes I., here was applicable which we -tuens one transfer our to ateates min to men atood ab quiery Type ferrus inclings. . wellacon to toleverseno beinteres in I the notes belonging to the estate to Judges Ames, amounting to some \$99,000.00 and related those belongers to the west, second ing to about \$27,000.00. Judge June afterwards nettled the eax suit for some (2300.00 and the conclusion of the ad inistration, in Merch, 1905, turned the notes back to morelland, to that at that time the artist of try. hear to the haute of appellant, completing of notes and configurat, accorded to the \$137,000.00. He also had charge of certain real cetain halonging to her consisting of 160 seres of land in Fapotis Caunty, a brisk and from store building to Milegens, a calling house. drouge were ine Itil year? to seven politions a saidty without on lets in melleville and faloroge. I obsequently one real estima prince and inference has begungen he leasedly as of smile and and redle doof of arits to necken a chem inclinat, inclinate afamered to bur attered one ober get, but alstee lest etonilli on some of it. Fre. Hess returned from Jestsenstille is Just think, and resided for your two pasts out towar porty and to the -reflect to become amounting after Mil that to I filliance.

Appellant visited her a number of times at Jacksonville and afterwards at Affingham, making in all from to to 30 trine to the two places. We testified that he devoted about one-half of his time to looking after her business, but during this time he, in connection with his two partners, sarried on the mercantile business which, in addition to them, required the services of four or five clerks and he was also loaning considerable money of his own. It was stipulated an the trial that all the money of appelles was loaned all the time at the rate of aix per cent per annua. In July, 191 , appelles, was by an order of court adjudged restored to reason and thereupon appellant filed his final report. Lach year for saven consecutive years prior to the filing of his final report, appellant had filed an annual report. In each of these reports he had charged himself with three per cent interest on the balance shown to have been in his hands by his last previous report, and also upon any additional sums he had received during the year, for the time the same had been in his hands. It also appeared that the rents on the real estate were collected by agents excent three derived from the fare and that such gents were paid out of the rents collected. The farm was rented for much rent with the exception of one year when grain rent was paid. These annual reports were approved by the county court and appellant was permitted to retain the other three per cent of the principal callected by him as interest, as his compensation. The total amount so retained by him during the time he served as conservator being\$30,907.39.

It also appeared from the proofs that when he took charge of Lrs. Less' business before he was appointed conservator, the agreement was that he was to receive as compensation for his services, one per cent and he expressed a willingness to make a similar arrangement with Irs. Hess after his discharge.

App affirmordest se east to redum a rod bestolv Smallegen es agist de et di trans, making in all fram de te sa tripa te Manhors Junda Jacksynb, at Jack highlings all passed and but east whit primer and president you self and the first time is, in somewhere while him too perimera, swrited so the manacatile husiness siles, in addition to them, required an economic elderablence this class and as we all the selfs to the termination money of his own. It was attpulated on the trial that all time Ris to siar aid to mit add Ila boncol own sollages to your per cont par annua. In July 1919, appelled, was by ma rain Amiliana minusted las assist of herofest bouluths frues to that that that report. Each year for seven concentive penry on hell's had sumlinger stoner Louis and to public out of raise Literal desired by at expose some to does at stroop Jeonne with three yes sent interest on the balance closes to here here to his bonds by his her, yearing report, and also by what also SALLord was in his resident Acrists On paint, his sin him Line the same rook basis in the header. It wiles separated that has renth on the real artely ears addressed by appele some there out to the blan even camera nous half has much out books the rate collected. The form was rested for each reat with the exception of our year then grain rest one pain, there some caucita were approved by the caucit one fact and approved and mitted to retain the other three per cent of the principal collocted by him as interport, as its overpanation. The total emount so gwinted by life suggest the time he sersed as seniorviter he-الملكي فالأولاد والأوساء

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It vidence was introduced by appellant tending to show that here. Here was in a normal condition of mind after she returned from Jacksonville, although the order adjudging her restared to reason, was not entered for seven years later. Appellant testified he showed her the reports each year and that she knew what he was charging and that she stated she was satisfied therewith. Te also introduced in evidence three letters from her to the same effect. The testimony for appellant tended to show that appellant presented his reports to re. Here each year, but did not go over them with her and that she did not realize the large amount he was retaining for his wark. During the time he acted as conservator, appallant produced a surety company to sign his bond with him and the charges for the services of the company were paid for by the catale of his ward.

A large volume of testimony was taken on the question of what was a responsible compensation for ampeliant's services as conservator. That introduced on the part of appallant showed that it had been the practice in the county court of Injette county for the last thirty years, to permit all conservators accounting in said court, to retain all interest on the funds of their respective estates in excess of three per cent per annum as compensation, regardless of the size of the astate or rate of interest received, and that it was by such rule appellant's compensation was fixed in his armual reports; but the present county judge testified the largest estate he would remember as being in his court in the last eight years, amounted to 110,000.00. A number of witnesses testified on the part of appellant that three per cent on the principal was a reasonable compensation, while a number testifying for appelled, ore equally positive that one per cent was reasonable.

appellant here insists (1) that a s there was no fraud concerl out or mistake, connected ith the annual reports and

a vidence was introduced by appollant tending to show this as was in a normal condition of sind after the returned actionary like, eliberthy the order editeding ber rectored actionary her rectored owed ner the separate estin rear and that the interesting the substantial interesting the sine that the interesting interpolate tenied in that chart expellent presented its separate to ir. The testings interpolate tenied in that did not so over then with her and that chart chart chart he was retuined for the tenth, with a clima the large manual he was retuined for the tenth of the couple for the couple of the couple of the couples for the couple of the couples of t

la moisseau ses se medra eer phoriteet le englev appel A the test a reasonable conceneration for appellant's corrier to is much the Planus to star all on bounderent sail . reservence addition to from grante and an interrest and mand had it ted outrays ment the termed of earny stains and and not simple show and no forgonal the misser of frues blac at patron The fines were applied to meants of sadates sylice and the rethe a compensation, regeraless of the size of the other or -lager size of tates is seed how the car subjects to lent's compagnation was fixed in his count reporter; our lies present county judge telitities the lorgest teritor of the could reserve ember as being in his court in the fact eight pears, or ourted Is structed in ballines measurable to reduce A .00.200.011 es all non the arms laghouter oil me took to cover to fait toutlages compensation, while a suches westiging for eggelles, ere equally positive the test past to avidice, viloupe

Appellant best interes of the state of the material of the mat

by him, there can be no review of the same on final hearing;
(2) that appelles being rational and having a true comprehension of her business affairs and knowing and agreeing to appellant's charges as conservator in managing her estate, connot now be heard to object netwithstanding appellant was acting as her conservator; and (3) that three per cent per annum was a reasonable and just compensation for the services rendered by him and that he should be permitted to retain that arount.

These contentions will be considered in the order states.

It is conceded that appellant received a large amount of interest that he failed to put in his reports and while it is true that he was sermitted by the court to make such reports and retain the omitted interest, yet the same were nevertheless, as a matter of fact, erroneous, irregular and a legal fraud against the ward, notwithstanding the fact that appellant did not intend any actual fraud. The statements ande by anpellant, like those made by personal representatives generally. vere in effect exparte and it is a general rule of las that connual or partial settlements of personal representatives when made ex parte as they usually are, have not, like a final acttlement, the force and effect of judgments and are not conclusive but are only prima facic evidence of the correctness of the account stated." 18 Cyc. 1194 note 89. Interlocutory settlements like the annual settlements of a conservator, guardian, executor or administrator, may be prima facie correct, but are not conclusive in favor of the personal representative against the party or parties interested in the estate. 22 (yc. 1152. Reizer v. Mertz, 223 111. 555.

This court in likex v. Parker 33 Thl. App. 479, in a case somewhat similar to this, affirmed an order of the circuit court requiring a conservator, who had made annual reports which had been approved by the county court, to restate his final report

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In terminal type I is New York of the Design Print Salestonia and M.C. The sellenge elegant ald at two of hallot mi fair the ware and it is even at arone and had becalered now on a. - Dr tha ere size all sey frequent herrin end aleder imp leger as a marker of fact, erronous, isrepair as and a taget PROPERTY THE WAY OF STREET, ST THE SECTION SECTION AND ARRIVED THE PROPERTY OF THE PARTY pullers of the time white terminal potential part profits init mai to effect imprope at it has about no bookle at our named or pertitor entries to recent to advantation tailery to found Are foull a wint plus been you offered unit as arms as when tion out, the force and effect of judgments and are and a new sil to manningure and to sumblive shock aming who was int syl within the and the party of the same and the state of the same and the antices, , and promote a conduction of families of the contraction two del gracus alack mulag all wice professionics go and facility evistations for the gap of the work of a facilities a few the party or parties arkers seed in the calculation of the . Bud . 111 COR . saget . v varia

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In the course of the opinion it is said, "It is insisted, however, that the appelles made yearly reports and had included therein these items disallowed by the circuit court and such reports were amproved by the county court, such reports are not open for a reconsideration by the court when the conservator files his final report and asks for his discharge. e do not so understand the law. o long as the conservator is atill engaged in the execution of his trust, his annual reports made by him and approved by the county court upon an experts application are, at most, only prime fedic evidence of the proper conduct and management of the extate. Until he has finally accounted and been discharged there is no necession for the word to resort to a court of equity to ascertain in what sanner to has executed his trust; as upon final report being ande and notice served upon the ward, upon being restored to reason, he can appear in the county court and have all such matter investigated as well as in a court of equity. To e are satisfied and adhere to the reasoning expressed in the above spinion as herein sol forth and are of opinion that the annual reports and by lant in this case, while prime facia correct, could not properly prevent a full investigation of his accounts when he prevented his final report and askediar a discharge. For was the court below provented from causing appellant's accounts to be recast by reason of the fact that the word had signified her antisfac. tion with his conduct and her desire to have him continue in the transaction of her business after her return from Jacksonville. I ven if she had corresponded the reports and the olarges made against her by appellant, it is doubtful whether under the cirade after his wird had been restored to reason, so that it outled to remain the second to reason the should that hugared to the reports presented by him should that he was not indebted to the ward in any arount.

la the course of the spinion it is said, "It is invision," behalend bed the expense where some ellegge edt tedt asvered ious has trace timerie and ye howofferth andit escal alexant reports were approved by the county court, such yer arts are not open for a recognished by the court case the assessment files his final report and asks for his discharge. Is in no as understand the law, a long as the consentrator to state onabout attended to the trust, his concept reports cond allow after me as new Jauce symme all of heretwee has all wi sellon ure, at most, only prime frete evidence of the preper ene affectl and and fitted . etatas ed to samegamen bas for home down and been discharged there is no occasion for air ward is and of themes fady at algirates of galupe to fruce a of lanet and the treat; as upon final report form and and make errol upon the word, upon being restored to recorn, ne can eppenr in the county court and have all such matters investigated entitle in the a description of a december of the first and alter the to the reasoning expressed in the above evinter or near in -fo no 10 ob a strenger famme and freis nelative to see bee site Alterear for hime . teatres short cuite ofthe . sees aids at sun! forevers at made stances and to medicalize the flut a travero from oils one see agreements a witherless are from I said aid Archet of at atmospherical transfer and the second believer wolld -a last a and beilings but bow out that foot out to moener vo out at months or his event of established bus four-mone and with a life transaction of her brainess after not return from to be mailes. when beginning and they of women and independent and and the providence against her by appelled, it is doubtful windies water the circlaim for such exharbitant compensation against her. The proofs fully show that even if she was not actually insans after her return from Jacksonville, she had little comprehension of business matters and as appellant was a thorough business man the two were not dealing upon equal terms. At any rate it appears to us to be shelly unjust that appellant should be paralited, by reason of his position as conservator of recess, to half and collect exhorbitant charges against her and then tree himself from legal liability therefor to her, when she make to claim her rights by asserting that although he acted as conservator for her on the theory that she was insane, yet she was not actually an insane person, but understood what he was doing.

The statute provides that " Conservators on settlement shall be allowed such fess and compensation for their ervices, as shall seem reasonable and just to the court (devised tot. chap. 86, sec. 36; and it remains to be considered whether the emount allowed the conservator by the court in this ease, was proper under the tens of the law. It appears there was a hard and fast rule or custom of the county court of layette county, in use for some thirty years, which allowed conservators to retain all over three per cent of the annual interest on the funde in their hands belonging to their words. It is evident that an inflexible rule of this kind commot be properly followed in all cases in fixing the commensation allowed by at tute. There might be some cases where the income was small and the labor, temporarily at least, somewhat arducus and where the income from the estate in excess of three per cent would be willy inadequate to pay the conservator for his services; while it is evident that there might be other comes where the income was very large and the estate so invested as to be sanily of collection, in thich in allowance of all over three per cent of the

piring for such exhorbitions compensation against incully show that even if she was not actually income affer her
return from Jacksonville, she had little comprehension of hunlime satters and as appellant was a thorough business was the
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fie elife as suctavisanol " f di sebivore sinista soll be allowed such fees and compensation for their services, as the seem reasonable and just to the court (Peviseen total silf redisable beredience of of animar it bas (35, see, 38 . unit conunt allowed the congernator by the court to this seem, were money under the terms of the law. It suppers there was a hand and for rule or everom of the county court of layette county, In pas for once thirty pasts, which allowed consequence to beshoul and no describe faunce out to tree may ports mayo the mind in that hadden being to that winds. It is evil at that an lie wibe offer yfragous of Journe baid with to offer offer all cases in fixing the convenention allowed by eletate. The De might be some cases where the impose was might and the labor, a nont air unai's has construe torisamon tonal to afternoon of -ul alies of hims disco and early to asson al educate will prodequare to pay the concernator for his survices; while is is Row emocal all stady names taile ad dright stady inds incheys -fro la villa ad as as beseaval os asatas est ban erret year lection, in which on allowance of all over three por cent of the

income to the conservator, for his carriers, such be emerbitant. The witnesses who testified upon this mubject placed the
just and reasonable compensation at from one to three per shill
cent on the principal annually, ith the proponderance to many
toward the smaller amount. In this connection it is of advantage in arriving at a correct to clusion, to consider what the
conservator himself considered his services worth. Frior to
the time he became conservator, he attended to the business of
hrs. Hess for a charge of one per cent per annum on the fund
and after he was discharged as conservator, he of the
tend to it for the same compensation.

It appears from the evidence that there were no additional duties cast upon appellant as conservator, in the matter of attending to the estate, to those which he assumed prior to his appointment, or would assume had he continued to act after the termination of his trust. It could seem therefore from a land's own estimate of the value of his services, as well as from a presenterance of the evidence in the case, that a charge of one per cent annually on the estate managed by him, would have been reasonable and just compensation to appellant for his services. The court below was liberal in its allowance of compensation to appellant, giving him much more than one per cent and the contention of the latter that he should be allowed more than the amount fixed by the trial court, appears to us to be without merit.

The judgment order of the court below will be affirmed.

To be reported in abstract only.)

the smaller amount. In this consection it is of advantage in an arriving at a consider white the consection, to consider what the conservator blaced for a considered his rervices vorth. . when to the find the set of the conservator, he was discharged as asservator, he offered to at fard to it for the same compensation.

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to be without serif.

The judg ent order of the court below will be cfirm ad-

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the	he
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the sa	iid
Appellate Court in the above entitled cause of record in my office.	
IN TESTIMONY WHEREOF I have set my hand and affixed the seal of said Cor	urt
at Mt. Vernon, this day of Mc	ay,
A. D. 1914. A. C. Millspaugh	
Clerk of the Appellate Court.	

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

P	ro	S	0	n	ŕ	

Hon. Harry Highee. Presiding Justice.

Hon. James C. McBride, Justice.	Î
Hon. Thos. M. Harris, Justice.	1
A. C. MILLSPAUGH, Clerk.	W. S. PAYNE, Sheriff.
And afterwards in Vacation, after said March t	erm, to-wit: On the day
of May, A. D. 1914, there was filed in the office of the	
OPINION in the words and figures following:	1
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Deford & Welkinson	ALL PROM
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A.	186 I.A. 631
vs.	Chaul GOURT
No. 3 3	
October Term, 1913.	
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	Mauon COUNTY
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TRIALJUDGE

Hon The M. Sitt



IN THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT,
October Term, A. D. 1913.

J. R. TELFORD AND C. E.)
WILKINSON, doing business as)
Telford & Wilkinson,)
Appellees,)

VS.

T. M. SMITH AND EARL C. HUGGINS, (T. M. Smith, Appellant).

186 I.A. 631

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY.

F I L E D
MAY 1 1914

© MILLSPAUGH

Per Curiam

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Appellees brought suit in the Circuit Court of
Marion County to restrain appellant from engaging in
the business of buying, selling or shipping grain and hay
and from buying or selling buggies, wagons or harness,
either by himself, through an agent or otherwise in the
City of Kinmundy in the County of Marion and State of
Illinois, so long as complainants or either of them were
engaged in said business in said City.

Appellees' claim for such restraining order is based upon a contract made between appellees and appellant whereby appellees were to purchase from appellant his grain elevator and hay barn located on the right-of-way of the Illinois Central Railroad Company in said City, together with the lease appellant held from said railroad company under which the privilege was given appellant to maintain said building on the railroad company's right-of-way. The contract also provided that appellant was to sell and appellees were to purchase a stock of wagons, buggies, and harness located in a store room in said City of Kinmundy.



There is no dispute between the parties that appellant Smith was to sell and did sell the appellees his grain elevator, hay barn and the stock of buggies, wagons and harness together with the good will of said business, and that appellant Smith was not to engage in the business of buying and selling grain and hay, buggies, wagons and harness in the City of Kinmundy so long as appellees were engaged in such business at that place. There is no dispute that appellees paid appellant Smith substantially the whole amount of appellants claim. There is no dispute either that appellant Smith after the sale and transfer of the business to appellees entered upon the same kind of business at said City of Kinmundy as that in which he was engaged before said sale.

The appellant Smith bases his right to avoid the provisions of the contract whereby he was not to engage in such business at that place on the claim made by him that appellees refused to invoice a few items of personal property. As to these items there is a conflict of the oral evidence whether they were to have been invoiced and the written contract does not mention them.

The trial court found that the contract of purchase had been fully complied with on the part of appellees, and we think the evidence fully sustains such finding.

The only remaining question to be determined is whether the contract not to engage in business can be enforced against appellant Smith.



Such contracts are universally recognized as binding on the parties when the limitations as to place and time are specifically mentioned. Here the place was the City of Kinmundy. The time was while the appellees were engaged in such business at that place. The inducement to buy a business very often is largely based on an agreement of this character. We find nothing in the contract which if enforced, would be against public policy.

The decree of the Circuit Court should be and is affirmed.

Not to be reported in full



The state of the
I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the
State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this / day of May,
A. D. 1914. a. C. Mills bung
Clerk of the Appellate Court.

OPINION

arch Term, 1915, No.

15 - 19320

ELSIE NELSON,

Defendant in Error,

VO.

EPHRAIM SWANSON, Plaintiff in Error.

Error to

Superior Court,

186 T.A. 632

MR. PHASIDING JULITICA SVITH ERLIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to review an order of the Superior Court of Cook County denying a motion of plaintiff in error to puseb a writ of capture at satisfacturable issued after the return of a writ of risri facts, bulls bune, and after a creditor's bill was filed, and for a discharge from arrest thereunder.

It is urged that the afficavit is defective and fatal because an unreasonable length of time intervened between the time the affidavit was evern to, and the day it was filed in court. This point is without marit. The record shows that the judgment was entered in a case wherein salice are the gist of the action. The court was authorized to order a capian against the body of plaintiff in error upon the ware motion of defendant in error treed on the record without any affidavit. (Sec. 5, Coap. 77, Burd's R. S.) Siebel v. Kuttnauer, 147 III. App. 627; Jernberg v. Mix, 195 III. 254. Thether the affidavit was filed situlate a reasonable time after it was evern to, or whether it was sufficient to justify the issuance of the capins is shally in all field.

The efficient merely brought to the attention of the court matters of record in the cause which surranted the order of court. The finding in the order as to what the affidavit showed was unnecessary and impaterial.

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The filing of a creditor's bill by defendant in error did not cut off her right to resort to the remedy provided by statute for the enfercement of the judgment by capica, the judgment being uncatisfied. Bradner, Smith & Co. v. Filliams, 178
Ill. 480; Vansant v. Allmon, 20 Ill. 26.

The order is affirmed.

AFFIRMED.











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